United States Court of Appeals

for the Second Circuit

APPENDIX

75-4132

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-4132

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

—against—

THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

—and—

THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII, and ITT WORLD COMMUNICATIONS, INC.,

Intervenors.

PETITION FOR REVIEW OF A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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APPENDIX

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WESTERN UNION INTERNATIONAL, INC., Petitioner, -against- THE FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, Respondents.	)	Docket No. 75-4132 PETITION FOR REVIEW

Western Union International, Inc. hereby petitions this Court for review of the Memorandum Opinion and Order of the Federal Communications Commission ("FCC") released June 23, 1975, a copy of which is attached hereto as Exhibit A.

I. The Nature of the Agency Proceedings as to Which Review is Sought.

The Memorandum Opinion and Order of the FCC of which review is sought (a) reversed a determination by the Chief of the Common Carrier Bureau of the FCC (Exhibit B hereto) that Section 222 of the Federal Communications Act, 47 U.S.C. § 222, prohibits The Western Union Telegraph Company from providing mailgram service between the United States Mainland and the State of Hawaii; (b) di-

rected the Chief of the Common Carrier Bureau to accept for filing the application by The Western Union Telegraph Company for authority to provide mailgram service between the United States Mainland and the State of Hawaii; and (c) dismissed and denied the opposition by Western Union International, Inc. and RCA Global Communications, Inc. to the application by The Western Union Telegraph Company for review by the FCC of the action taken by the Chief of the Common Carrier Bureau.

II. The Facts on Which Venue is Based.

The venue of the Court is based upon the provisions of 28 U.S.C. § 2343. Western Union International, Inc. has its principal place of business at One WUI Plaza, New York, New York.

III. The Grounds on Which Relief is Sought.

Western Union International, Inc. petitions for review of the Memorandum Opinion and Order of the FCC on the ground that (a) as recognized in the FCC Memorandum Opinion and Order telegraph services provided between the United States Mainland and the State of Hawaii are "international" services for purposes of Section 222 of the Federal Communications Act, 47 U.S.C. § 222; (b) Section 222 precludes the FCC from considering any application by The Western Union Telegraph Company for authorization to provide international

telegraph services between the United States Mainland and the State of Hawaii; and (c) the FCC therefore exceeded its powers in permitting The Western Union Telegraph Company to file an application for authorization to provide mailgram service between the United States Mainland and the State of Hawaii; and (d) the FCC otherwise erred in the determinations and orders recited in paragraph I above.

IV. The Relief Prayed.

Western Union International, Inc. prays for an order setting aside the June 23, 1975 Memorandum Opinion and Order of the FCC and enjoining the FCC from considering any application by The Western Union Telegraph Company for authority to provide mailgram service between the United States Mainland and the State of Hawaii.

New York, New York
July 2, 1975

Respectfully submitted,

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List of Parties Who Were Permitted
to Participate in the Proceedings
Before the FCC Other Than Respondents.

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1. The Western Union Telegraph Company.

2. RCA Global Communications, Inc.

Exhibit A to the Petition for Review is the Memorandum Opinion and Order of the Federal Communications Commission, released June 23, 1975, reproduced herein at pages A7-60.

Exhibit B to the Petition for Review is the decision of the Chief of the Common Carrier Bureau of the Federal Communications Commission, dated April 19, 1972, reproduced herein at pages A69-70.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 75-673
35649

In the Matter of	)
	)
THE WESTERN UNION TELEGRAPH COMPANY	)
	)
Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Lease and to Operate Facilities to Extend Mailgram Service Between the United States Mainland and Hawaii	)

MEMORANDUM OPINION AND ORDER

Adopted: June 11, 1975; Released: June 23, 1975.

By the Commission: Commissioner Reid concurring and issuing a statement;
Commissioner Hooks concurring in the result.

1. The Commission is herein considering:

(a) An application for Review of Action taken Pursuant to Delegated Authority filed by The Western Union Telegraph Company (WU) on May 19, 1972, requesting that the Commission, pursuant to Section 1.115 of our Rules and Regulations, review the determination made by the Chief, Common Carrier Bureau (Bureau) that WU is prohibited by Section 222 of the Communications Act of 1934, 47 U.S.C. §222

(1971), from leasing and operating facilities to extend Mailgram service between the United States Mainland and Hawaii;[1/]

(b) An Opposition to WU's Application for Review (Opposition) filed by RCA Global Communications, Inc. (RCA) on June 26, 1972, urging that the Bureau was correct in its determination that Section 222 is an absolute bar to WU's engaging in any overseas telegraph operations;

(c) A Petition for Waiver filed pursuant to Section 1.3 of the Commission's Rules and Regulations, 47 C.F.R. §1.3 (1973), by Western Union International, Inc. (WUI) on June 26, 1972, requesting that the Commission waive the requirements set forth in Sections 1.115(f) and 1.49 of its Rules;

(d) A Petition of WUI to Dismiss or Deny (WU's) Application for Review (Petition) filed June 26, 1972, asserting that as a matter of law, under Section 222, WU is precluded from providing international record services;

1/ On April 4, 1972, WU filed an Application for Authority Pursuant to Section 214 of the Communications Act to lease and operate facilities to extend Mailgram service between the United States and Hawaii. The Chief, Common Carrier Bureau, pursuant to Section 0.294 (now, 0.291) of the Commission's Rules and Regulations, 47 C.F.R. §0.294 (1973), determined that the FCC was unable to accept WU's application for filing because Section 222 prohibited the applicant as a matter of law from providing the proposed Mailgram service. Letter of Chief, Common Carrier Bureau dated April 19, 1972.

(e) A Reply by WU to the RCA Opposition and the WUI Petition to dismiss its Application for Review (Reply), filed July 25, 1972;

(f) A Petition for Permission to File Additional Pleadings, filed by WUI on August 11, 1972, requesting permission to file a pleading in response to WU's Reply;

(g) Comments of WUI filed August 11, 1972, in response to the WU Reply dated July 25, 1972;

(h) An Opposition to WUI's Petition for Permission to File an Additional Pleading filed on August 28, 1972 by WU; and

(i) A Reply to WU's opposition to WUI's Petition for Permission to file an Additional Pleading, filed by WUI on September 6, 1972.

Positions of the Parties

2. In its Application for Review, WU requests the Commission to review and reverse the Bureau's determination that Section 222 of the Communications Act prohibits WU from providing Mailgram service between the United States Mainland and the State of Hawaii. WU argues that the Bureau incorrectly

interpreted the divestment requirement of Section 222(c)(2) too broadly as a pervasive restriction on the scope of WU's activities and that such an interpretation is not warranted by the language of the statute.2/ In support of its contention, WU advances two alternative arguments. First, WU argues that the Commission is empowered to authorize re-entry of WU into international telegraph operations. In support of this argument, WU asserts that the statute does not specifically state that WU is barred from any future international telegraph operations; that if Congress had intended such a bar, it would have so stated. WU further claims that the Bureau misinterpreted the legislative history of the statute, and that a correct reading thereof supports its contention that WU may be authorized to provide such international or overseas services as the Commission finds to be in the public interest. WU also argues that the divestment

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2/ Section 222(c)(2), the so-called "divestment clause," provides in pertinent part that:

> Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger. . . .

This legislation was enacted to permit WU to acquire its sole domestic competitor, Postal Telegraph Cable Company, and thereby achieve a monopoly position for domestic telegraph operations. For a discussion of the legislative history, see the Appendix hereto.

requirement should be narrowly construed since it represents a restriction on its conduct of business and that public policy disfavors such restrictions. Finally, WU argues that, since exclusion is not mandated by the statutory language or the legislative history, a broad interpretation of the provision would unnecessarily frustrate the general regulatory policy of allowing regulatory agencies flexibility in dealing with problems under changing circumstances. Alternatively, WU argues that, assuming arguendo that the divestment clause does bar WU re-entry into the international or overseas operations of which it divested itself, that bar would apply only to those telegraph operations "theretofore carried on."3/ WU contends that since Mailgram is a "new service", which it did not provide at the time Section 222 was enacted and which was not among the operations divested, we cannot validly interpret the divestment requirement as a bar to authorizing WU to provide Mailgram internationally, or to Hawaii.

3. WU's request for review is opposed by RCA and WUI, which both urge the Commission to affirm the Bureau's action.4/

3/ See footnote 2, supra.

4/ In connection with its Petition to Dismiss, WUI filed a request for waiver of the Rules relating to formal requirements of pleadings. So that we can have the benefits of WUI's views, we grant the request for waiver and accept WUI's Petition for consideration herein.

Essentially, the opponents challenge WU's assertion that the Commission is empowered to authorize WU re-entry into international telegraph operations and argue that the only correct interpretation of the divestment clause is as an absolute and permanent bar on any form of international or overseas telegraph operations by WU. Restriction to domestic telegraph operations is, they argue, the price WU had to pay for permission to merge with the Postal Telegraph Cable Co. (Postal). It points out that WU was not required to effect the merger, but voluntarily chose to do so, with knowledge of the divestment requirement. RCA and WUI argue that the absence of a time limit on the divestment requirement, contrary to WU's position, indicates that Congress intended a permanent ban on WU international telegraph operations. Both opponents assert that it is clear from the legislative history that Congress intended WU permanently to be disqualified from competing with the International Record Carriers (IRC's) so long as it had a domestic telegraph monopoly which would enable it unfairly to favor its own international operations. Since WU still has that monopoly, and is still able to favor itself to the detriment of the IRC's,

the purposes prompting inclusion of the divestment requirement remain valid and the bar on WU international operations necessary. The opponents also challenge WU's alternative argument on the question of "new" telegraphic services. Since they view Section 222 as a permanent bar on WU international operations, they claim that the "new service" distinction is without merit. They see no support in the statute or its legislative history for WU's interpretation of the statutory language "international telegraph operations theretofore carried on." Assuming, however, that WU is correct, RCA argues that Mailgram in any event is not so different from traditional public message telegraph service (PMS) that it could reasonably be classified as a distinct service. RCA points out that mail delivery of telegrams has been provided for in carrier tariffs for many years. In conclusion, the opponents request that the Commission dismiss the WU Application for Review as unwarranted, or to affirm the

Bureau's action.[5/]

Discussion and Conclusions

4. As disclosed by the pleadings herein, we are faced with the narrow legal question whether the Bureau correctly interpreted the divestment clause of Section 222(c)(2) as a permanent bar to WU international or overseas telegraph operations. In deciding this question we must, of course, bear in mind the totality of our responsibilities under the Communications Act and the requirements of the public interest, the touchstone standard of this Act. If we find Section 222 a bar, we must uphold the Bureau's refusal to

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5/ WU filed a reply to the oppositions reiterating the arguments in its Application for Review and asserting that neither WUI nor RCA had shown anything which disproved its arguments. WUI filed a request for permission to file an additional pleading in response to WU's Reply. This request was opposed by WU and WUI filed comments on WUI's opposition. We believe that the complexity of the issues in this case call for a full exposition of the views of interested parties. Accordingly, we grant WUI's request for permission to file a special pleading. The only new argument raised by WUI in this pleading is an attack on an argument in WU's reply that economic factors had coerced it into merging with Postal. Since our decision herein does not turn on the voluntariness of the merger, we do not have to resolve the dispute thus set forth in these pleadings.

accept WU's application for authority to provide Mailgram Service between the United States mainland and Hawaii. At the outset, it is clear that Hawaii is an international point for purposes of Section 222, despite the fact that it is a State. As we held in Telegraph Service with Hawaii, 28 F.C.C. 599 (1960), Congress, in drafting Section 222, was concerned with the geographical location of service points, rather than with their political status in classifying them as domestic or international. Moreover, after Hawaii was admitted as a State, Congress amended the Act to provide that it continues to be an international or overseas point for purposes of Section 222. See Section 222(a)(10) which excludes Hawaii from the term "Continental United States" as used in Section 222.6/ Further, it is clear that Mailgram

6/ Public Law 86-624 (July 12, 1960). Prior to the amendment, the section defined "Continental United States" as "the several States and the District of Columbia." Section 222(a)(6) defines "international telegraph operations" as

> acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States, Alaska, Canada, Saint-Pierre-Miquelon, Mexico and Newfoundland. . . . (emphasis added).

By excluding Hawaii from the definition of continental United States, Congress indicated that record communications between the United States Mainland and Hawaii were to be regarded as international rather than domestic.

is a record, as opposed to voice, service, and hence falls within the Section 222 definition of "telegraph operations."7/ Thus, a grant of WU's application for authority to provide Mailgram service to Hawaii would involve WU in international telegraph operations, and would represent the first time WU has engaged in such operations since divestment of its international facilities in 1963.

5. RCA and WUI argue for a broad interpretation of the divestment clause which would impose an absolute and permanent ban on WU international telegraph operations, while WU seeks a narrow construction which would permit it to re-enter the international arena to a limited extent. While we have had occasion in the past to interpret the requirements of the divestment clause, we were there concerned with such matters as whether WU was required to effect divestment 8/ or whether it could expand its historical services into areas not previously served.9/ The precise issue raised by the instant pleadings; that is

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7/ Section 222(a)(5) defines "domestic telegraph operations" and Section 222(a)(6) defines "international telegraph operations." In both instances, the operative words are "record communications by wire or radio."

8/ Western Union Telegraph Co., 25 F.C.C. 35 (1958).

9/ Telegraph Service with Hawaii, 28 F.C.C. 599 (1960).

the effect of the divestment clause on proposals to provide a service not covered by the express statutory language, presents a case of first impression. After careful review of all relevant matters, we find nothing in the statute or its legislative history which mandates a broad interpretation of the divestment clause such as to disqualify WU from providing the proposed Mailgram service to Hawaii. From our reading of the statute and its legislative history, we conclude that Congress in enacting Section 222 did not intend to divide the communications market between international and domestic carriers. If it had, then certainly Section 222 would have applied to all carriers present and future, and not just WU. Rather, it simply was seeking to remedy the problems which were facing the troubled telegraph industry in 1943. The restrictions placed on the parties to the merger were ancillary to this main purpose. The restrictions, taken as a whole, were designed only to prevent abuses by WU which might flow from its position as the sole domestic entity with extensive public message operations in the continental United States. This Congress accomplished in essentially two ways: (1) the divestment clause in Section 222(c)(2); and

(2) the imposition under Section 222(e)(1) of a formula to govern distribution by it among the IRC's of outbound international message telegrams pending divestment. In construing the divestment clause we must look to the intent of Congress in including it and effectuate that intent. As we view Congressional intent, we do not believe that it requires a sweeping prohibition on WU internacional operations to prevent abuses. Moreover, we believe that the public interest would be best served by including WU among those who are being considered as potential suppliers of this type of service to Hawaii. Accordingly, for the reasons set forth below, we conclude that the Bureau's action was erroneous, and that WU's Application for Authority should be accepted for filing and consideration on the merits.10/

6. Under Section 1 of the Communications Act, we have an express duty to assure the people of the United States rapid and efficient communications services at reasonable

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10/ WUI also argues that Section 2.18 of the September 15, 1960 Agreement between it and WU under which WUI acquired WU's international facilities and operations would bar WU from providing Mailgram service to Hawaii. We have considered the language of the clause and do not construe it so.

charges. The rapid growth rate of WU's Mailgram service on the mainland suggests that the service is popular and that it is filling a need. Since its introduction in 1970, WU has steadily expanded the availability and flexibility of Mailgram service. For example, Mailgram service is presently available for messages inbound to the United States from Canada and WU is negotiating for an early introduction of outbound service to Canada.11/ Also, WU offers both-way Mailgram service to Alaska through interconnection with RCA Alaska Communications, Inc. We believe that the people of Hawaii are entitled to the benefits of this service, and should not be deprived of the opportunity to have it provided by WU, in the event that we should determine that WU's proposal is superior to other pending applications. Throughout the Communications Act, Congress has made clear that it was not imposing strict limitations on the power of the Commission. Rather it has stated broad legislative goals and given the Commission broad and

11/ Under Section 222, service between the United States and Canada is considered domestic telegraph operations. 47 U.S.C. See §222(a)(5) (1971).

and flexible powers to achieve those goals in the light of changing circumstances.[12/] We see nothing in the legislative history of the statute which requires us mechanically to disqualify WU from the chance to provide this service without considering the merits and benefits of its proposal. In the absence of an express statutory bar, we believe the public interest will be served by retaining maximum flexibility to decide the question of Mailgram service to Hawaii.

7. We decide herein only that WU should have the opportunity to pursue its application before this Commission but do not pass on its merits. We note that in addition to the WU proposal, there are pending before us applications for authority to provide a service similar to Mailgram filed by RCA, ITT, WUI ("Telepost"), The Hawaiian Telephone Co. ("Mailgram") in connection with WU,[13/] and the Domestic Satellite Corporation ("Lettergram"). There are both

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12/ See, e.g., United States v. Southwestern Cable Co., 392 U.S. 157 (1966), United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

13/ At the time Hawaiian's application was filed, Hawaiian had an agreement with WU jointly to provide the service. Since that time, WU has indicated its desire to withdraw from the agreement. Hawaiian has stated that it wishes to pursue its application notwithstanding WU's desire to withdraw.

similarities and significant differences among these proposals. Thus, our action only permits WU's application to be considered along with the other applications. The decision as to which carrier or carriers shall be authorized to provide this service to Hawaii will be made by subsequent order, after we have had an opportunity to consider which proposals best serve the public interest.

8. With respect to Section 222, we have previously ruled in considering the domestic satellite applications of RCA and WUI that this Section applies only to record services of the nature "theretofore carried on by WU" at the time Section 222 was enacted in 1943, principally message telegraph service. See American Satellite Corporation, 43 F.C.C. 2d 348, 353-354 (1973), RCA Global Communications, Inc., et al., 42 F.C.C. 2d 774, 780 (19[illegible]). In our judgment, Mailgram service constitutes a new and distinctly different service from public message telegraph service of the kind Congress was contemplating in 1943. Before amplifying these views, we point out further that insofar as competition to the record carriers is concerned, any entity other than WU would be clearly eligible to seek entry in competition with the record carriers to provide this type of service to Hawaii. On the basis of the record

before us, we see no potential for abuses by WU of the type that concerned Congress in enacting the divestment clause. It might well be that in our subsequent review of the applications to provide Mailgram-like service to Hawaii, we will authorize only one carrier to provide that service. In view of the possibility of a single carrier, we would want all applications before us to consider. If, on the other hand, we authorize more than one carrier to provide service, we cannot assume that any competitor will act unfairly. However, if at any time it appears that such problems exist, we have ample authority under the Act to take necessary actions to rectify abuses short of a sweeping prohibition. In other words, we do not construe Section 222 as affording the record carriers any umbrella protection from competition found to be in the public interest on communications grounds.

9. We turn now to our conclusion that Mailgram is a new service distinct from those offered in 1943. While Mailgram is clearly a record service, it has special characteristics that make it different from traditional services. In its Application for Review, WU characterizes Mailgram as "a new innovative service provided by WU under joint

arrangement with the United States Postal Service." The salient characteristics of Mailgram is that the delivery function is the responsibility of the Postal Service rather than WU as in the case of PMS. Essentially, Mailgram may be classed as "electronic mail" which combines some aspects of a traditional telegram with those of mail into a hybrid form which is identical to neither. Operationally, Mailgrams are accepted by WU on the Mainland by various means available for pick-up of PMS messages, including telephone (Centralized Telephone Bureau), telex, TWX, tieline, over the counter, messenger, and facsimile.[14/] The Mailgrams are then transmitted over telegraph company circuits to its computer switching center in Middletown, Virginia. At Middletown, the computer routes the Mailgrams over circuits specifically dedicated to Mailgram service to a preselected Post Office (called a Serving Post Office or SPO) serving the Zip Code area designated in the address.

14/ Mailgrams, but not PMS, may also be filed by submission to WU of specially-prepared magnetic tapes and by direct computer transmission.

At the SPO, the Mailgram message is received on a burster teleprinter supplied by WU which prints it on special paper. A Postal Service employee then inserts it into a special envelope and places it in the mails for delivery with the next regular mail delivery. According to WU, the service standard for Mailgram is next business-day delivery, although differences in time zones across the country raise the possibility of same-day delivery in some cases.

10. As we noted above, the principal difference between Mailgrams and PMS is that Mailgrams are ultimately delivered by the Postal Service which, accordingly, bears total responsibility for their delivery. WU merely accepts the originating customer's message and transmits it electronically to the SPO. The service is thus subject to the practices of the Postal Service while message telegrams are not. In the case of PMS, however, the customer is seeking rapid, reliable delivery of his message for which a written record is available. For a full-rate telegram, WU is obligated to make a first delivery attempt within five hours or receipt, or the customer is entitled to a refund of the charges.15/

15/ The standard for messages delivered by telephone or tieline (including telex and TWX) is two hours and five hours for messenger delivery.

Even for the Overnight Telegram (OT), which might be considered more closely to resemble Mailgram, WU has full responsibility for delivery, a specified time in which to attempt delivery, and an obligation to refund charges if the standard is not met.16/

16/ While this class more closely resembles Mailgram service than does the full-rate telegram, there are differences here as well. An OT message is accepted for delivery "not earlier than the following morning." WU Tariff F.C.C. No. 255 at p. 25. An OT is not transmitted to the delivery office until all higher classes have been sent, while a Mailgram generally is transmitted instantaneously to the SPO. OT's are delivered by the various means used for a full-rate message -- telephone, tieline, and messenger (upon payment of the $3.00 delivery charge) -- while Mailgrams are delivered only by the Postal Service. Thus, OT's may be delivered on Sundays and holidays when there is no mail delivery. Further, in the rare cases where time zone differences permit, Mailgrams can be delivered on the same day they were filed while OT's cannot. WU is required to attempt delivery of OT's by 2:00 P.M. of the day following filing or refund the charges. Finally, the tariff charges for OT's are somewhat higher than those for some classes of Mailgrams ($4.00 for up to 100 words for OT's, as opposed to $2.50 for a Mailgram of the same length) and the name-to, address, and signature are not counted as chargeable words in an OT. We conclude from these differences that OT's constitute a separate service from Mailgram.

11. In the case of Mailgrams, the Postal Service makes no guarantee as to the date or time of delivery, or even that delivery will occur, and does not provide for refunds for non-delivery.[17/] The service typically features next business-day delivery, but the customer requiring positive delivery within a specified time cannot rely on this objective. Further, a significant portion of PMS traffic arises in connection with money orders and for this purpose Mailgrams are presently unsuitable.

12. Acknowledging the basic differences in delivery methods and responsibilities, the charges for Mailgram

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17/ For the limited class of Mailgrams filed on magentic tape or by direct computer transmission, a certified delivery service analogous to certified mail is available upon payment of an additional $.60 charge. Under this arrangement, the Postal Service will (1) obtain the signature of the addressee, or the person at the same address accepting delivery, on a form supplied by the Postal Service to certify delivery has been made, (2) obtain the recipient's signature on a separate Postal Service return receipt form, and (3) forward the receipt to WU for return to the sender. In the event the sender fails to receive the receipt within 30 days, WU's tariff provides that the sender's recourse is against the Postal Service directly in accordance with Postal Service procedures. The certified delivery feature is not available for Mailgrams filed over-the-counter or by telephone or tieline. See WU Tariff F.C.C. No. 260, pp. 7-8 (Rule 4.2.6), 9.1-10 (Rules 4.3.13 and 4.3.14), and 19(Rule 5.6).

and PMS respectively differ substantially both as to rate levels and as to pricing practices. The rates for a full-rate message telegram are significantly higher than those for a Mailgram. The basic charge for a full-rate telegram is $4.75 for a minimum of 15 words (with decreasing additional charges for each word over 15) plus a supplemental charge of $3.00 where messenger delivery is specified. For domestic Mailgrams originated by telephone, tie-line, or over the counter, the charge is $2.50 for 100 words or less ($1.00 for each additional block of 100 words or less). For Mailgrams originated over telex or TWX, charges vary according to rate areas established by WU. Because the same minimum charge applies to any Mailgram of less than 100 words, regardless of the actual number of chargeable words, the wordcount function is simplified or, in many cases, eliminated. In this connection, we note that for Mailgram, but nor for PMS, the name-to, address, and signature are classed as chargeable words.[18/]

18/ We note that PMS usage has been declining for many years. The IRC's argue that Mailgram has contributed to this decline. While this is no doubt true, the mere fact that for some users Mailgram provides a substitute for PMS, does not mean that it is identical therewith. The decline in PMS is also traceable in part to increased use of telex, TWX, leased-channel service, telephone, and even air mail. None of the IRC's have argued that these media are therefore the same as PMS.

13. There is attached as an Appendix a Memorandum setting forth the basis for our view that neither the terms nor the legislative history of Section 222 require the conclusion that WU is statutorily barred from seeking authority to provide Mailgram service to Hawaii. This Appendix also discusses various administrative precedents which some of the parties assert to be relevant. Upon consideration of all of the foregoing and the Appendix we conclude that the divestment clause of Section 222 is not a bar to WU's providing Mailgram to Hawaii. We hold that WU's application to provide Mailgram service to Hawaii is acceptable for filing and comparative consideration.[19/]

19/ On February 21, 1975, WUI filed a request for oral argument before the Commission en banc to consider the general question whether WU is eligible under Section 222(a)(5) of the Act to provide any international telegraph services. Essentially, WUI asserts that such argument would be helpful to place "in clearer focus" the legal concepts in various pending Commission proceedings in which this general question is in issue. After reviewing WUI's arguments, we have determined to deny WUI's request. WUI and the other IRC's have pleaded on numerous occasions their arguments as to the applicability of Section 222 to WU. There is presently before us an adequate record for decision and we do not believe that the requested oral argument will materially assist us. Accordingly, we hereby deny WUI's request for oral argument. See FCC v. WJR The Goodwill Station, Inc., 337 U.S. 265, 276 (1949); NLRB v. Allied Distributing Corp., 297 F.2d 629, 680-681 (10th Cir., 1961).

14. Accordingly, IT IS ORDERED, Pursuant to Section 1.115 of the Commission's Rules and Regulations, that the Application for Review of Action taken Pursuant to Delegated Authority filed by The Western Union Telegraph Company in the above-captioned proceeding is, to the extent provided for herein, GRANTED, but is otherwise DENIED in all respects; and that the Chief, Common Carrier Bureau is directed to accept for filing the Application for Authority to provide Mailgram Service to Hawaii filed on April 4, 1972 by The Western Union Telegraph Company.

15. IT IS FURTHER ORDERED, That the Opposition to Application for Review of Action taken Pursuant to Delegated Authority filed by RCA Global Communications, Inc. and the Petition of Western Union International, Inc. to Dismiss or Deny Application for Review are hereby DENIED.

*FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

*See attached concurring statement of Commissioner Reid.

A P P E N D I X

MEMORANDUM ON SECTION 222 - ITS LEGISLATIVE HISTORY AND VARIOUS COMMISSION PRECEDENTS

1. The "divestment" requirement underlying the present dispute is part of an overall legislative package in Section 222 which was added to the Act in 1943 to permit the merger of Western Union Telegraph Company (WU) and Postal Telegraph Cable Company (Postal). To place the matter in its proper perspective, it is necessary briefly to discuss the factual situation in which the divestment requirement arose. At the time Section 222 was being considered WU and Postal were the sole remaining domestic carriers providing nationwide public message telegraph service (PMS).[1/] After World War I, Postal experienced a long-term decline in its revenues until, by 1943, it appeared to be in danger of bankruptcy. WU also had experienced a steady decline in revenues, but was in a

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1/ The American Telephone and Telegraph Co. (AT&T), in addition to its telephone service, offered record services (TWX and telegraph-grade leased channel services). AT&T's revenues from its record services were sufficient in 1943 to make it the second largest domestic telegraph carrier (after WU). However, AT&T did not provide message telegraph service.

stronger financial position than Postal. Congress was concerned over the state of both the domestic and international telegraph carriers and instituted a study of the industry to determine what should be done to guarantee that the nation would have a viable domestic telegraph message service.[2/] Eventually, Congress settled on a merger of Postal and WU as the best means of accomplishing that goal. Therefore, Section 222 was enacted to remove the Section 314 prohibition on mergers of telegraph carriers[3/] and allow a voluntary merger.[4/] Because the

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2/ S. Res. 95, 76th Congress, 1st Session (1939).

3/ Section 314 of the Act, 47 U.S.C. §314 (1970), provides that [N]o person engaged . . . in . . . transmitting and/or receiving for hire . . . communications or signals by radio . . . shall by purchase, lease, construction, or otherwise . . . acquire, own, control or operate any cable wire telegraph or telephone line or system between any place in any State . . . of the United States . . . if . . . the purpose is and/or effect thereof may be to lessen competition . . . .

4/ Congress was also concerned about the condition of the international record carriers (IRC's) and proposed legislation to permit them to merge as well. The provisions dealing with the international merger, however, were removed from the bill finally enacted as Section 222.

resulting merger would create in WU a domestic message telegraph monopoly, Congress included several ancillary provisions designed to prevent or control abuses it feared could result from that monopoly. It was particularly concerned by the fact that in addition to its domestic business, WU was also engaged in extensive international telegraph operations (through its Cables Division) in competition with the international record carriers (IRC's). Because WU would be able to use its virtual monopoly on the domestic pick up and delivery of international message telegrams unfairly to favor its Cables Division, Congress included the Section 222(c)(2) requirement that after merger, WU should divest itself of the "international telegraph operations" it "theretofore carried on." Congress also provided for a formula for division of international telegraph traffic picked up by WU among the international record carriers. See Section 222(c)(1). Pursuant to the divestment requirement, WU eventually sold its international operations to an independent entity that operates under the name Western Union International, Inc. (WUI).

2. It is apparent from the statutory language that the divestment requirement does not impose upon WU an all-

emcompassing bar to future international or overseas operations. The operative language provides only that WU must divest itself of the international telegraph operations in which it had "theretofore" engaged. The pertinent question, therefore, is whether the legislative history reflects any intent not apparent in the statute on its face. RCA and WUI argue that there was a Congressional intent permanently to bar WU from international operations, as reflected in the legislative history.[5/] However, as we read the legislative history, there appears to be nothing to mandate such a conclusion. Upon consideration of the history discussed below, we are of the view that the divestment provision should be interpreted to apply only to the types of operations engaged in by WU at the time of the merger in 1943. Since Mailgram was not among such services, WU is not barred from being authorized to provide Hawaii Mailgram Service.

5/ WUI states that the statutory phrase "international telegraph operations theretofore carried on is "merely descriptive of what was to be divested [by WU]." WUI, however, challenges WU's reading of that language and states that it "cannot reasonably be construed as conferring any rights upon WU to overturn the entire statutory scheme be re-entering or reacquiring international operations." Petition of Western Union International, Inc. to Dismiss or Deny Application for Review at p. 36.

3. Essentially, WU argues in its Application for Review that the Commission was not deprived of discretion to authorize WU international operations.[6/] WU finds support for this position in a recommendation of the Senate Committee on Interstate Commerce for a bill to authorize the telegraph merger. The Committee recommended inter alia that the legislation "empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to 'domestic' telegraph operations if found to be in the public interest . . . ."[7/] WU argues that this recommendation was embodied in the divestment requirement and leaves the Commission the power to authorize those international operations it finds to be in the public interest. RCA disputes this view, however, and argues, along with WUI, that the mandatory language appearing in the present divestment clause does not give the Commission any discretion in this regard. We believe

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6/ WU Application for Review of Action Taken Pursuant to Delegated Authority at p. 11.

7/ S. Rept. No. 769 at p. 25. The quoted language resulted from changes made by the full committee before submission of the report to the Senate. The original draft had provided the Commission be empowered "eventually to permit the merged domestic carrier to restrict itself to 'domestic' telegraph operations . . . ." (Emphasis added).

that both WU on the one hand, and RCA and WUI on the other, have misread the legislative history.

4. The divestment clause in the present Section 222 cannot be read in isolation. It is the result of many years of Congressional and Commission inquiry into the problems of the telegraph industry and possible solutions for those problems. The question had been studied repeatedly and the consensus was that a merger of Postal and WU, and a separate merger of the international carriers, was the most practicable solution to the problems of the industry.[8/] The Commission had prepared two reports -- one in 1935[9/] and a later one issued in two parts (1) on the domestic telegraph industry (1939) and (2) on the international industry (1940) (collectively, the 1939 report).[10/]

8/ See, e.g., Hearings on S. Res. 95, 76th Cong., 1st Sess. (Part 1), (1941) (1941 Hearings)5.

9/ The text of this report may be found in the Hearings on S. Res. 95, 76th Cong., 1st Session, at pp. 13-21 (1939 Hearings).

10/ The 1939 (domestic) report is printed in the 1941 hearings (Part 2) at pp. 394-450. The 1940 (international) report is printed at pp. 451-481.

In both of these reports the Commission recommended merger legislation. The 1935 report included a recommended draft bill to permit the merger, but that bill contained no provision dealing with divestment of the WU international operations. See 1939 Hearings at pp. 14-15. Congress took no action on the proposal until 1939 when it instituted its own study of the industry and directed the Commission to submit a new report (1939 Report). The Commission recommended legislation which would (1) permit WU and Postal to merge, (2) permit the merged carrier to acquire AT&T's TWX and telegraph leased channel services, (3) discontinue the domestic telegraph operations of Mackay Radio Telegraph Co. (now ITT Worldcom) and RCA (which the merged domestic carrier would be permitted to acquire); and (4) permit merger of the international carriers.[11/] As is apparent from this proposal, the Commission was recommending a total restructuring of the United States communications

11/ There was also a "minority view" which differed from the majority proposal in that under the recommendation there should be separate mergers of radio telegraph and wire telegraph carriers, rather than one entity comprising both modes of transmission. Also, the minority saw no need for the merged landline carrier to acquire the AT&T leased channel service. See 1941 hearings (Part 1) at pp. 219-23.

industry into a domestic telegraph entity, a separate international telegraph entity and one telephone entity operating in both the international and domestic spheres. It is interesting to note that neither in the 1939 Report nor in the amplifying testimony of Commissioners Fly and Craven[12/] was there any explicit discussion of whether WU's then operation in both the international and domestic spheres would represent a problem if the restructuring proposal was to be implemented; nor was there any discussion of a divestment requirement.[13/] The Senate's Report on its 1939 study (S. Rept. No. 769) did, however, make specific recommendations to deal with WU's dual domestic and inter-

12/ Commissioner Lawrence Fly testified for the majority and Commissioner Craven for the minority in the hearings held in connection with the 1939 Senate study. See 1941 Hearings (Part 1) at pp. 4-27 (Fly) and pp. 218 et seq. (Craven).

13/ Apparently, the Commission looked at the question only in terms of concurrent international and domestic mergers. Presumably, if there were a separate international merger, WU's Cables Division would be merged along with the other IRC's. Absent that merger, there appears to have been no consideration of a divestment requirement applicable solely to WU.

national operations.[14/] This is the language quoted by WU that the Commission be given discretionary power to restrict WU to domestic operations after the merger. From the legislative history two important themes are evident and should be emphasized. First, it is clear that in

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14/ S. Rept. No. 769 at p. 25 provided that

1. [T]he Congress [should] approve an amendment to the Communications Act of 1934, permitting --
   (a) Domestic American telegraph carriers to merge; and
   (b) International American telegraph carriers to merge; but with
   (c) A proviso that there should be no merger between or common control of domestic and international communications carriers but permitting a merger of domestic carriers into one entity and international carriers into a second and entirely separate and distinct entity; and
   (d) The legislation should define "domestic" and "international" carriers and shall not prevent the inclusion of all existing operations of any domestic carrier, which may be engaged partially in international telegraph communications, into the merged domestic enterprise, and shall empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations if found to be in the public interest; and
   (e) There should be no requirement that the domestic or international mergers be carried out simultaneously or at all . . . .

proposing merger legislation Congress was intending a total restructuring of the industry along the lines of the Commission's recommendations and the legislation was to effect that purpose. However, no requirement for a single international entity was ultimately enacted. Second, with respect to WU's international operations, it is clear that the senators were concerned that WU would get from the merger a domestic telegraph monopoly which would allow it unfairly to favor its own Cables Division. It was this potential for abuse that prompted inclusion of the provision empowering the Commission to restrict WU to the domestic sphere. As we read the legislative history, this was the dominant purpose underlying the statute and it is this purpose which we must bear in mind in interpreting the divestment clause.

5. The Committee's recommendations were implemented in a draft bill S. 2445 which was introduced in 1941. That bill contained a divestment requirement (in the event of merger) substantially identical to the version finally enacted:

> Any proposed consolidation and merger of domestic telegraph carriers shall provide for the divestment by [WU] of the international telegraph operations theretofore carried on [by it] . . . .

The bill did not, as the present Section 222 does, define any of the terms used in it. We therefore have no indication of the meaning intended by the phrase "international telegraph operations theretofore carried on." We do have the statement of the bill's drafter, Senator McFarland, that it was intended "to reflect what is contained in Senate Rept. No. 769 . . ."[15/] After hearings, the Committee reported a substitute bill S. 2598 which also contained a divestment requirement, the operative words of which were also "international telegraph operations theretofore carried on." See S. Rept. No. 1490 at p. 1. The only discussion of the bill in S. Rept. No. 1490 is that the bill "provides for the divestment by the merged or consolidated domestic telegraph carrier of any international telegraph business it may carry on"[16/] and therefore sheds little light on the meaning to be given the phrase. The substitute bill limited the merger authorization to domestic telegraph carriers because of the objections of the defense agencies

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15/ Hearings on S. 2445, at pp. 6-7. Senator White, who helped McFarland draft the bill, agreed to McFarland's characterization. Id. at p. 7.

16/ Id. at p. 9.

that the disruption attendant upon an international merger would endanger the war effort.[17] There is no discussion in the Committee report of the impact upon the overall restructuring of the industry from deletion of the international merger provisions. Also, there was no discussion of its impact upon the provisions remaining in the bill. Rather, the provisions were simply deleted. S. 2598 passed the Senate and was sent to the House. The House Interstate and Foreign Commerce Committee reported, after hearings, a substitute bill[18] which, inter alia, restored the international merger provisions and included a requirement that the merged international carrier divest itself of any domestic telegraph operations.[19] The bill failed in the House for lack of a quorum and died when the Congress came to an end.

17/ Id. at p. 8.

18/ See H. Rept. No. 2664 at p. 2.

19/ Before World War II, Mackay and RCA engaged in domestic radio telegraph operations. During the war, however, those operations were halted by the War Communications Board on the grounds that radio transmission presented too many problems of security and that the frequencies used were needed for the defense agencies. After the war, those operations were not started again.

6. In the succeeding Congress, the matter came before the Senate again in S. 158. That bill was identical in all relevant respects to bill S. 2598 as passed by the Senate the year before. In reporting this bill to the Senate, the Committee, in S. Rept. No. 13, incorporated by reference the comments and analysis made in S. Rept. No. 1490 relating to S. 2598. S. Rept. No. 13 at p. 1. The bill passed the Senate and was sent to the House. In the House, the divestment clause was removed due to problems which the House believed would render such divestment impossible.[20/] After passage in the House, the House and Senate versions were referred to a conference committee to work out the differences between them. The conference committee version of the bill, which is the present Section 222, did not provide for an international merger and restored the WU divestment requirement.[21/]

20/ The House report on this bill (H. Rept. No. 69) does not state the reason the provision was deleted, but we can assume that the remarks in H. Rept. No. 2664 (reporting S. 2598) are applicable to this matter. In H. Rept. No. 2664, the House Committee stated that the provision was deleted since it was felt the existence of the Anglo leases would prevent divestment. In 1943, WU held five 99 year leases for transatlantic submarine cables from the Anglo-American Cable Co., Ltd. Provisions in the leases forbade assignment of the leases to anyone other than an assignee who also was assigned WU's domestic landline system.

21/ See H. Rept. No. 142.

7. As was the case with its predecessors, the Conference Committee report sheds no light on the meaning to be given the phrase "international telegraph operations theretofore carried on" and we must therefore assume that the phrase was intended to have the same meaning as it did in earlier versions of the language. Our only clue to the meaning of the phrase is the statement in S. Rept. No. 1490 (reporting S. 2598) that the divestment clause "provides for the divestment by the merged or consolidated domestic telegraph carrier of any international telegraph business it may carry on." S. Rept. No. 1490 at p. 9. From this language it appears to us that the phrase in the divestment clause is no more than a descriptive phrase defining the operations which WU was to be required to divest in return for merger with Postal. In this we agree both with WU and with WUI. However, we disagree with both parties as to the significance of this language with respect to future WU international operations.

8. Neither in the statutory language nor in the legislative history is it clear that WU is forever barred from all types of international operations or that, once divested of prior operations, WU was thereafter free to re-enter the same operations. Congress simply appears never to have

addressed the question. This is not surprising considering the circumstances with which Congress was then dealing. The telegraph industry had been relatively static for many years; except for the persistent decline in revenues. Congress could not expect that teletypewriter exchange service (Telex and TWX) or leased channel services, which accounted for very minor portions of telegraph company revenues in the 1930's, would in later years become the dominant services and that the revenues therefrom would grow at such a tremendous rate. Rather, Congress was dealing with the industry in its contemporary pattern. While Congress provided a comprehensive scheme covering the narrow situation before it, it gave no indication of an intent to legislate for future situations involving different technology and service patterns or to supersede other pertinent sections of the Act. In the absence of any provisions or discussion dealing with the situation presented by WU's Hawaii Mailgram proposal, we must construe the provisions of Section 222 in the light of the scheme of the Act as a whole, where Congress did set forth broad guidelines and gave us ample authority and discretion to deal with evolving circumstances.

9. To recapitulate, while we do not find the legislative history to be of much help in construing the language of the statute -- "international telegraph operations theretofore carried on" -- it does appear that the fundamental purpose of the divestment requirement was to protect against abuses which could follow upon the merger as a result of WU's position as the sole domestic pick-up and delivery agent for PMS traffic in the United States. Congress feared that WU would be able to use its domestic monopoly position unfairly to favor its international Cables Division in competing with international carriers in providing PMS service (which constituted virtually their entire business). Since the international carriers in 1943 operated only in the gateway cities, they were dependent on WU for the bulk of the domestic pick-up and delivery of their PMS traffic. Thus, WU was in a position virtually to drive an international carrier or carriers out of business were it so inclined. It was in this context that Congress required WU to divest itself of its international operations and enacted the formula provisions. We agree with WUI and RCA that a construction of the divestment provision which would permit WU to re-enter the same international operations the

the day after it divested its prior operations would render the requirement meaningless and absurd. It makes no sense, in view of the purpose underlying the divestment clause, to require divestment if WU could re-enter international PMS operations in competition with the IRC's. However, we are not dealing there with a proposal for WU to provide PMS to Hawaii. After considering the policy of the divestment requirement, we conclude that the divestment clause required WU to divest itself of the international operations it was engaged in at the time of the merger, primarily PMS, and does not deprive this Commission of discretion to authorize WU to provide overseas points with new services that were not within the contemplation of Congress in 1943.

10. Nor are prior decisions of this Commission relied upon by RCA and WUI contrary to the view announced herein. Both WUI and RCA urge that our decision in Western Union Telegraph Co. (Divestment II), 25 F.C.C. 35 (1958), order set aside and remanded sub nom, Western Union Telegraph Co. v. United States, 267 F.2d 715 (D.C. Cir. 1959), requires WU forever to be limited to domestic operations. We do not agree with this conclusion. The divestment order in question was issued as the decision in Docket No. 10151. Pursuant

to the divestment requirement in Section 222(c)(2), the Commission's order approving the domestic telegraph merger, Application for Merger of Western Union and Postal Telegraph, 10 F.C.C. 148 (1943) (Docket No. 6517), we ordered WU to divest itself of its operations within one year. Id. at 154. We recognized the difficulties represented by the Anglo lease and World War II and provided that WU could request extension of that time so long as it exercised the required due diligence in effecting divestment. Extensions of time were granted until 1952, when we instituted an inquiry (Docket No. 10151) to determine the nature and extent of WU's efforts to divest itself of the international operations, any impediments that existed thereto, and whether the Commission could or should prescribe a plan of divestment (or should modify the requirement in some way). Western Union Telegraph Co. (Divestment I), Order released March 6, 1952, quoted in 25 F.C.C. 35 at pp. 35-39. After hearings, we concluded that WU had not exercised due diligence in effecting divestment, 25 F.C.C., at 84, and directed it to file a plan of divestment within six months of the release of the order, Id. at p. 90.[22/] The factual situation in

22/ The Divestment II order was appealed by WU, Western Union Telegraph Co. v. United States, 267 F.2d 715

which that case arose was that eight years after the merger and our divestment order, WU was still operating its international facilities without appearing to have made diligent efforts to comply with our order. Therefore, our basic concern was the discharge of our statutory duty to enforce the divestment requirement and whether WU could comply in view of its legal obligations. As we noted, Congress drafted the divestment requirement with full awareness of the Anglo lease and had concluded that it did not present an insurmountable obstacle. In ordering divestment, we concluded, therefore, only that Congress intended WU to divest itself and that WU was able and required to comply with that requirement. The case does not stand for the proposition that WU could never offer any form of international services -- the question simply was not at issue there.

(D.C. Cir.) (1959). The court upheld the Commission's power to require WU to file a plan of divestment, but set aside our order and remanded the matter to the Commission because it felt we had exceeded our authority in requiring a plan by a date certain without regard to whether "due diligence" could secure such a plan. The Commission could, said the Court, require WU to file a plan after due diligence had produced a viable one, or we could direct it to submit conditional plans by a date certain subject to agreement of lessor to an assignment of the leases without the landline system.

11. By the same token, Western Union Telegraph Co. (Divestment III), 30 F.C.C. 232 (1961) (Docket No. 6517), where we approved the divestment plan submitted pursuant to Docket No. 10151, does not hold that there is a permanent bar to any WU international operations. That case involved a proposal that WU acquire 250,000 shares of Class B stock in Western Union International, Inc. (the corporate name under which the American Securities Corp. would purchase and operate WU's international operations). We held that WU could not hold this stock consistent with the divestment requirement in Section 222(c)(2), even though WU would not thereby have any influence on the new company since the Class B stock had no voting rights. Our decision turned not only on the requirement that WU divest itself of the operations it carried on in 1943, but also on the prohibition in Section 222(b)(1) on WU acquisition of any interest in an international telegraph carrier.[23/] As the stock plan would clearly result in WU's retention of a direct financial, if not a management, interest in its former international operations (thus not achieving the complete divestment called for by the statute) and would also amount

23/ See 30 F.C.C. at 340-1.

to acquisition of an interest in an international telegraph carrier (in violation of the explicit language of Section 222(b)(1)), the plan ran afoul of Congressional intent. In the present case, neither of these problems exist. WU proposes to provide Hawaii Mailgram without participation of any IRC and does not propose to use any facilities of which it divested itself. Thus, there is neither a retention of WU's prior interest in international operations nor acquisition of an interest in an international telegraph carrier.[24/]

12. It bears noting that one of the objections to the stock plan was that it would complicate unduly, or possibly frustrate, the potential merger of the international telegraph carriers, authorization of which was then being considered in Congress with the active support of the Commission. We stated that the mandatory redemption feature of the Class B stock[25/] would create severe problems

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24/ We note the stock plan in question in the Divestment III case provided that, as a separate transaction, WU could purchase the stock for $100,000. For this reason, the stock was not part of the consideration for its Cables Division but represented a separate acquisition of stock.

25/ The agreement stated that at any time in the event of dissolution, voluntary or otherwise, of WUI, Class B stockholders were to receive $10.00 per share from the assets of WUI available for distribution to stockholders, and only after this had been paid in full could other

in the event of an international merger, no matter who held the stock, and could therefore frustrate the merger and the public interest benefits to be derived therefrom. As we have seen from the legislative history, the international merger was an integral part of what Congress hoped ultimately to achieve through Section 222. In view of all these considerations, the decision not to permit WU to own stock in WUI is based on reasons not applicable to the instant situation and that decision does not stand as a bar to consideration of WU's application.

13. WUI also relies on our decision in Telegraph Service with Hawaii, 28 F.C.C. 599 (1960) (Docket No. 13188), to support its contention that WU is limited to domestic operations. After Hawaii's admission as a State, WU indicated that it desired for the first time to offer its traditional telegraph services between Hawaii and the United States Mainland. WU indicated that it desired to do so only as part of its domestic telegraph operations and contended that Hawaii's admission as a State, had made it a domestic point. By Order released September 9, 1959, F.C.C. 59-916, we instituted an inquiry to determine what changes we should recommend Congress to make in the Act to deal with WU's proposal. The problem under consideration

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stockholders share in any remaining assets. The Class B stock was also subject to a redemption feature under which WUI could redeem the stock at any time for $10 per share. See 30 F.C.C. at 339.

arose from the following facts: As enacted, Section 222(a)(6) defined "international telegraph operations" as those between any point in the world and "the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland." The term "continental United States" was defined (Section 222(a)(10)) as "the several States and the District of Columbia." In 1943, Hawaii (as a territory) was not part of the "continental United States" and communications between Hawaii and mainland fell within "international telegraph operations." In view of these definitions, Hawaii's admission as a State would appear automatically to have changed Hawaii to a domestic point since it would now be within the definition of "continental United States." We were not convinced Congress had intended such an automatic change in the existing pattern of service and concluded that, if such a change were to be made, it should come about only after consideration of the impact on the public interest. Although WU characterized its proposal as expansion of its domestic telegraph operations, we regarded it as actually involving international telegraph operations.26/ We concluded that, as used in

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26/ Indeed, WU had stated that it was uninterested in the proposed expansion if it would be considered part of its international operations which it was then under an order to divest at the earliest possible date.

Section 222, the distinction between international and domestic service points was drawn on geographical rather than political lines, and that Hawaii's change in political status was irrelevant for purposes of its status under the divestment clause.27/

14. Thus, if WU were authorized to serve Hawaii with its traditional services, that service would be included in its international operations and would be subject to our divestment order. Also, the Hawaii Service case stated that we would not recommend to Congress a change in the Act to permit Hawaii to be treated as a domestic point. 28 F.C.C. at 616. Further, we determined to recommend changes which would make clear that Hawaii should not be treated as a domestic point for purposes of Section 222. In 1960, Congress adopted our recommendation and amended

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27/ We noted in that case that even when Hawaii was a territory, communications between it and the mainland were "interstate communications" under Section 3 of the Act for purposes of the Commission's jurisdiction. We concluded that the inconsistency between that designation and its treatment under Section 222 was significant and indicated an intention to base its classification on other than political considerations. See, 28 F.C.C. at 605.

the Act specifically to exclude Hawaii as within the continental United States.[28/] We reached our conclusion by looking to the policy which the distinction between international and domestic operations was to serve. In connection with that policy we stated that

> [WU] carried on . . . oversea service [N.B., to points other than Hawaii prior to the adoption of Section 222] in competition with a number of other telegraph carriers which were primarily engaged in such oversea service. Since these latter carriers had only limited facilities for the collection of traffic from, and delivery of traffic to, the public on the U.S. Mainland, they were dependent on and had contractual arrangements with either Western Union or Postal Telegraph for the collection and delivery of their traffic at places they did not serve.
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> 12. . . .
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> Congress was concerned, among other things, that after such merger . . . [WU] would be able to favor either its own cable system or a particular oversea carrier, to the detriment of others with respect to pickup and delivery at mainland points not served by the limited facilities of such carriers.
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> 13. To prevent this, Congress determined that Western Union should divest itself of its oversea telegraph operations (that is,

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28/ On December 22, 1959 we had recommended that Section 222(a)(10) be changed to define continental United States as "The District of Columbia and the States of the Union except Hawaii." In the Hawaii Service case, we "reiterate[d] the aforementioned recommendation." 28 F.C.C., at 616 by Public Law 86-264, 74 Stat. 411. See, 47 U.S.C. §222(a)(10) (1971).

> in which it competed with these carriers), and further determined that Western Union should distribute equitably among these oversea carriers such traffic as was filed with it for delivery at points they served outside the U.S. mainland. 28 F.C.C. at 602.

15. In response to WU's argument that Hawaii's status had changed, we observed further that "as a consideration to its merger with Postal Telegraph, Western Union, as a domestic telegraph carrier must withdraw from competition with the international telegraph carriers to oversea points, whether they be foreign points or interstate points under Section 3." 28 F.C.C., at 604. From this language, it is apparent that we were concerned in the Hawaii Service case, as we are herein and as Congress was in enacting the divestment requirement, with the potential for abuse which WU's position both as the sole pickup and delivery agent for the IRC's and as one of their competitors. It is for this reason that we rejected WU's proposal to serve Hawaii with PMS and other similar services and recommended changes to the Act which would preclude WU from offering competitive services to Hawaii. That holding, however, was limited to the particular services involved in WU's proposal which were

being provided by the IRC's. Thus, we do not find our holding there inconsistent with our present interpretation.

16. We are concerned here, however, with a new service which is not currently offered by any carrier between the mainland and Hawaii. We have competing applications in which all applicants, including WU, are equally situated; where the public interest may be be measured without regard to benefits or detriments attendant upon the 1943 merger. Therefore, the concerns we expressed in the Hawaii Service case, supra., do not speak to the present facts. It is not our function to shield the IRC's from competition. Our concern in this regard is to assure that all carriers act fairly toward the public and one another. This we can do within the broad powers given us by Congress to regulate in the public interest. We see no need in this matter to pronounce sweeping prohibitions on the activities of a carrier which are not mandated by the statute and which may be detrimental to the public interest.

17. In conclusion, we point again to the precedents we consider most relevant to the present situation. Thus, in our domestic satellite authorizations we expressly held that Section 222 applies only to record services of the

type offered by WU in 1943, principally PMS. American Satellite Corporation, 43 FCC 2d 348, 353 (1973), RCA Global Communications, Inc., 42 FCC 2d 774, 780 (1973). Moreover, in our Second Report and Order in Docket No. 16495, 35 FCC 2d 844 (1972), which promulgated the policies governing domestic satellite operations, we determined that the rates and services between Hawaii and the mainland should be integrated into domestic rate patterns, 35 F.C.C.2d at 857-858. We stated that in the event that the record carriers did not achieve satisfactory compliance with this requirement, we would consider authorizing the provision of these services by another carrier such as AT&T or GTE Satellite Corporation. Section 222 has no applicability to any domestic carrier other than WU and does not preclude competition to the IRC's in the provision of Hawaii/Mainland service. This fact is significant in considering the impact of the divestment clause. Had Congress intended to divide the telegraph industry into domestic and international spheres and to preclude a carrier from operating in both spheres, it would have done so by a provision more tailored to achieve that goal than

the divestment clause. The fact that Section 222(c)(2) does not provide for the advent of new carriers, but deals only with the then international operations of one carrier suggests that this was not Congress' intent. As we have said, Congress in enacting Section 222 was facing a specific situation and dealing with particular entities. The statute it enacted attempted to deal with only that situation. Congress did not attempt thereby to anticipate changing circumstances and the advent of new communications services; and it did not attempt to preclude the provision of such services by any carrier.

CONCURRING STATEMENT
OF
COMMISSIONER CHARLOTTE T. REID

RE: Western Union's Application to Extend Mailgram Service to Hawaii

The citizens of Hawaii are clearly entitled to Mailgram service and I fully agree with my colleagues that this obviously attractive service should be forthcoming.

But, in my opinion, the plain language of Section 222 of the Act raises questions about the legality of Western Union providing such service to Hawaii. Hawaii, by the terms of Section 222(a)(6) and (10), is excluded from the definition of domestic points. It also bothers me that Congress saw fit to amend Section 222(a)(10) to specifically except Hawaii from the definition of "continental United States" in 1960 1/ (subsequent to the time Hawaii became a State).

I realize that, as it pertains to Hawaii, the distinction between domestic and international services has become somewhat blurred. This is illustrated by our "domsat" decision as well as our decision allowing AT&T to provide alternate voice-data service to Hawaii. Never-

1/ Pub. L., No. 86-624, approved July 12, 1960.

theless, I would have opted for the more conservative route of removing any legal impediment to our action by amendment of Section 222 prior to acceptance of Western Union's application. I note that the Commission intends to ask Congress to make this adjustment in the very near future.

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

April 19, 1972

IN REPLY REFER TO:
9500

The Western Union Telegraph Company
7916 Westpark Drive
McLean, Virginia 22101

Attention: P. S. Schenk, Group Vice President
R. W. Stone, Assistant Vice President

Gentlemen:

1. I am writing with respect to your recent application, filed April 4, 1972, requesting authority pursuant to Section 214 of the Communications Act of 1934 to lease and operate facilities between the 48 contiguous United States and the State of Hawaii for the purpose of extending The Western Union Telegraph Company (WUTC) MAILGRAM service to include the provision of MAILGRAM between the Mainland and Hawaii.

2. As your application implicitly indicates, a threshold question to be determined prior to acceptance of such application for filing is whether WUTC may, as a matter of law under the provisions of Section 222 of the Communications Act of 1934, provide such service. For the reasons indicated below, it appears that such section does prohibit WUTC from engaging in such service, and we, therefore, are unable to accept such application for filing but will not return it

pending disposition on any timely filed petition for reconsideration by WUTC. This action is taken pursuant to authority delegated to the Chief, Common Carrier Bureau, by 47 C.F.R. § 0.294.

3. We have carefully reviewed your arguments, set out at Pages 5 - 8, inclusive, of the proposed application, that Section 222 does not preclude WUTC from offering its proposed service, and they appear to be as follows:

a. That Section 222 refers to international telegraph operations theretofore carried on by WUTC, but does not preclude it from ever again engaging in international telegraph operations;

b. that MAILGRAM service is a new service, and not one "theretofore" carried on, and moreover will be provided by means of a medium - satellite - not in existence at the time Section 222 was enacted;

c. that accepted principles of statutory construction provide for a narrow construction of a "flat prohibition";

d. that it would be unreasonable to assume that Congress intended to preclude WUTC from engaging in future types of international record service, irrespective of public benefit, since the Commission would have full authority under Section

214 to disallow any such service it did not believe to be in the public interest;

e. that the proposed Second Report and Order recommended by the Bureau, and attached to the Commission's Memorandum Opinion and Order issued March 17, 1972 in Docket No. 16495 is dispositive of this issue in favor of WUTC.

4. Section 222 was added to the Act in 1943 to permit WUTC to acquire Postal Telegraph, which was in imminent financial danger of failure. As a condition to allowing this merger of domestic telegraph carriers, Section 222(c)(2) required that any party to the consolidation or merger must divest itself of "international telegraph operations theretofore carried on." Congress defined domestic and international telegraph operations solely on the basis of geographical rather than political delineation. (See Sections 222(a)(5) and 222(a)(6).) Section 222(a)(10), which defines "continental United States", was amended in 1960[1]/ after the admission of Hawaii to statehood to preserve Hawaii's exclusion from the definition of continental United States. Thus communication between the Mainland and Hawaii remained classified for the purpose of Section 222 as "international operations"

1/ Hawaii Omnibus Act § 36, 47 U.S.C. § 222(a)(10) (1970).

and specifically excluded Hawaii from inclusion under "domestic telegraph operations."2/ This amendment was necessary to maintain the status quo; i.e., telegraph operations between the Mainland and Hawaii are international operations and WUTC is precluded from engaging in such operations, inasmuch as without such an amendment, it could reasonably be argued that Hawaii had, with its admission to statehood, become a part of "domestic telegraph operations" for purposes of Section 222.

5. Initially, we note that an examination of the legislative history of the divestment requirement set out in Section 222(a)(2) leads to the conclusion that Congress did intend to preclude WUTC from engaging in future "international telegraph operations" as that term is defined in Section 222. Thus, in S. Rep. No. 13, 78th Cong., 1st Session (1943), on S. 158 (which became Section 222), it was noted, at Page 4, that, as a result of a study of the telegraph industry conducted by the Senate Committee on Interstate Commerce, it was recommended that Congress approve an amendment to the Communications Act which "should define 'domestic' and 'international' carriers. . . and shall empower the Federal Communications Commission eventually to require the merged domestic carrier

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2/ See, H. R. Rep. No. 1564, 86th Cong., 2d Sess. 3 (1960) which states: "In a few instances it has been found desirable,

to restrict itself solely to domestic telegraph operations if found to be in the public interest . . ." (Emphasis added.)3/

6. In Docket No. 13188, In the Matter of Amendment of the Communications Act of 1934, as Amended, Relating to Telegraph Service with Hawaii4/, WUTC alleged that it planned to offer telegraph message, telex, leased line, and money order services between the Mainland

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2/ (Cont'd)
notwithstanding Hawaii's admission to statehood, to maintain existing arrangements in Hawaii or between Hawaii and the mainland which differ from those in or between the other states. These cases do not affect "the equal footing" doctrine, but grow out either of Hawaii's geographic location or of historical developments which cannot be ignored; . . . /P/rovision is likewise made . . . for maintenance (at least until the Federal Communications Commission reviews the matter thoroughly) of the treatment of telegraphic operations between the mainland and Hawaii as international rather than as domestic in character; . . ."

For further discussion see pages 17-18 of the above-mentioned House Report.

3/ S. 158, with one minor exception not germane to this inquiry, was identical to S. 2598 passed by the Senate in the 77th Congress, 2d Session. Senate Bill 2598 was favorably reported by the House Interstate and Foreign Commerce Committee (H. Rpt. No. 2664) but was not acted upon in the House because of lack of a quorum. The Report (No. 1490) of the Senate Interstate Commerce Committee on Senate Bill 2598 is fully applicable to Senate Bill 148 and was therefore incorporated verbatim in Senate Report No. 13 on Senate Bill 158.

4/ 28 F.C.C. 599 (1960).

and Hawaii and, therefore, requested that Section 222 be amended to permit it to serve Hawaii as part of its domestic telegraph operation.[5/] Before we discuss the Commission's response to this request, it is appropriate to note an inconsistency in WUTC's advocacy in the instant application as compared with that followed in Docket No. 13188. WUTC argues that MAILGRAM is a new and innovative service which was not theretofore carried on prior to the merger of WUTC and Postal Telegraph and that, consequently, the scope of Section 222 would not encompass or preclude this service. The same argument could have been made for the provision of telex service between the Mainland and Hawaii in 1960, as telex was a new and innovative service which was first offered commercially, on a very limited scale, in the United States in 1958; telex would thus be a service not theretofore offered prior to the merger of WUTC and Postal Telegraph. However, WUTC apparently did not think this argument had merit in 1960 when it requested that Section 222 be amended to allow them to provide telegraph services -- including telex -- between the Mainland and Hawaii.

5/ Id. at 609.

7. It is obvious from the instant application, that no matter how new and innovative MAILGRAM service may be, it is basically a telegraph service, inasmuch as the essential transmission will be performed by WUTC, with delivery by the Post Office at destination. Moreover, it is obvious that MAILGRAM service will be a serious contender for a portion of the present market for message telegraph services between the Mainland and Hawaii presently offered by the international record carriers individually or jointly with Western Union. There is nothing to preclude Western Union and one or more international record carriers from entering into arrangements similar to those now in effect with respect to message traffic for the rendition of MAILGRAM service to Hawaii.

8. In its May 11, 1960 decision in Docket No. 13188, concerning telegraph service to Hawaii, the Commission stated:

> "We must conclude therefore that in Section 222 Congress intended that, as a condition to its merger with Postal Telegraph, Western Union, as a domestic telegraph carrier, must withdraw from competition with the international telegraph carriers to overseas points, whether they be foreign points or interstate points under Section 3." 6/

6/ 28 F.C.C. 599, 604 (1960).

The Western Union Telegraph Company
Attention: P. S. Schenk, Group Vice President
R. W. Stone, Assistant Vice President

9. The Commission further concluded that:

> "Since service to any of these points /i.e., Hawaii, Puerto Rico, and the Virgin Islands/ is undoubtedly an international telegraph operation, we cannot order or permit Western Union to provide such service, no matter how urgent the public interest. If we find that the public interest requires that we should possess such power, the remedy is to ask Congress to amend Section 222, not for us to misinterpret it."[7/]

10. Insofar as WUTC quotes from the attachment to the Commission's recent decision in Docket No. 16495, it misunderstands the thrust of the intent of the language, which is revealed by a full reading of the context from which the cited language is taken. The question there being considered was whether WUTC was precluded by Section 222 from owning an earth station in Hawaii as part of a domestic system since Section 222(a)(10) excludes Hawaii from the definition of "continental United States." WUTC failed to quote the following language, which appears in the same paragraph as the language it cites:

7/ Id. at 605.

"In the event we determine as a matter of policy that Hawaii should be included in a domestic system, there would seem to be no warrant for disqualifying Western Union alone from having any earth station interest there, particularly if the principal use of the earth station is for television program reception and other specialized services and Western Union is precluded from providing telegraph service between CONUS and Hawaii."[8/]

As we have noted above (Paragraph 7), the proposed MAILGRAM service is basically a telegraph service and, therefore, is covered by the last clause of the language above quoted.

11. In summary, therefore, we conclude:

a. The proposed service is an international telegraph service;

b. Section 222 is intended to preclude WUTC from providing future international telegraph services, as well as those provided in 1943, in competition with the independent international telegraph carriers; and

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8/ Commission Memorandum Opinion and Order, FCC 72-229 at 56-57, 37 Fed. Reg. 5866, 5883 (1972). To the extent that the referenced language in the staff recommendation may lend itself to a construction that an offering of the subject service to Hawaii by Western Union is permissible under Section 222, the language

c. the Commission, therefore, has no authority to grant the instant application, even if it were considered in the public interest, absent an amendment of Section 222 of the Communications Act.

Sincerely yours,

Bernard Strassburg
Chief, Common Carrier Bureau

8/ (Cont'd)

in question should be amended to remove the basis for any such possible construction.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20054

In the Matter of	)
THE WESTERN UNION TELEGRAPH COMPANY	)
Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Lease and to Operate Facilities to Extend MAILGRAM Service Between the United States Mainland and Hawaii.	)

FCC-2618

The Western Union Telegraph Company (Western Union) hereby applies for authority pursuant to Section 214 of the Communications Act of 1934, as amended (Communications Act), to lease and to operate facilities between the 48 contiguous United States and the District of Columbia (Mainland), on the one hand, and the State of Hawaii, on the other hand, for the purpose of extending its MAILGRAM Service to include the provision of MAILGRAMs between the Mainland and Hawaii.

Western Union's MAILGRAM Service is an innovative low cost record service furnished on an experimental basis since January 1, 1970 by Western Union under joint arrangements with the United States Postal Service (USPS). MAILGRAMs are accepted by Western Union and transmitted over its facilities to a high-capacity computer and thence to a teleprinter located in a designated Serving Post Office (SPO) near the addressee. At the SPO, MAILGRAMs are placed into special envelopes by a postal employee and delivered to their ultimate destination by a postal carrier. Normally, MAILGRAMs which are sent on one day are delivered the next business day. However, due to time zone differences, same business day

delivery will be achieved in many instances for MAILGRAMs sent in the early morning from the eastern United States to Hawaii.

MAILGRAM Service to Hawaii from the Mainland will be similar to that provided on the Mainland and will be available to the same customers, and in the same way, as at present. Thus, MAILGRAMs will be accepted from all Telex, TWX and INFO-COM locations (Part I); through customer-prepared magnetic tape at certain specified locations (Part II); and by telephone, tieline or over the counter in selected cities (Part III).

At the outset MAILGRAM messages from Hawaii to the Mainland will be accepted only from teleprinter terminals (Part I) as is presently the case in nearly all other States. While Western Union does not contemplate furnishing teleprinter terminals to users in Hawaii for the purpose of sending MAILGRAMs, Western Union will endeavor to enter into interconnecting arrangements with all carriers who furnish teleprinter terminals in Hawaii for teleprinter switched services to allow their subscribers to send MAILGRAMs. Indeed, Western Union will attempt to negotiate fair and reasonable interconnecting arrangements with <u>all</u> other carriers furnishing teleprinter switched services for the inputting of MAILGRAMs both to and from Hawaii.

Although MAILGRAM acceptance and delivery is now limited to the 48 contiguous United States and the District of Columbia, public demand for MAILGRAM Service has been very significant and message volumes are now approximating nearly 6,000,000 MAILGRAM messages per year. The realization of such MAILGRAM volumes over a relatively short period, with sales promotion necessarily restricted by the limited capacities of the initial Western Union computer network and with the limited nature of the initial offering, clearly evidences the public benefits to be achieved by extending at the earliest possible date MAILGRAM acceptance and delivery to include the State of Hawaii. The need for the proposed extension of the MAILGRAM Service is further demonstrated by the strong support for this service extension shown in the attached letters from prospective users (Attachment No. 1). Moreover, the USPS has shown a strong interest in the extension of MAILGRAM Service to Hawaii as evidenced by the attached USPS press release (Attachment No. 2).

An especially attractive feature of this service extension is the operational arrangement which will permit MAILGRAM Service between Hawaii and the Mainland to be fully integrated into Western Union's present domestic service at low cost. This results from the following three operational benefits:

1. By use of dedicated circuits between Middletown, Virginia and Hawaii, Western Union's new and expanded ISCS (Information Services Computer System) MAILGRAM Center at Middletown will

switch, process and rate all MAILGRAMs to and from Hawaii with only minimum software and hardware modifications.

2. The contractual arrangements between Western Union and the USPS already contemplate MAILGRAM Service for Hawaii and the extensive operational arrangements with USPS require only minor adaptation.
3. It is necessary to establish only a MAILGRAM Sub-Center in Hawaii for the purpose of servicing MAILGRAMs with the Hawaii SPO. The MAILGRAM Service Center at Middletown will continue to act as the primary Center for all MAILGRAM processing and coordination with USPS, including MAILGRAMs to and from Hawaii.

As a result of these operational benefits, it is proposed to establish attractive rate levels and integrate the MAILGRAM charges to and from Hawaii into Western Union's general domestic rate pattern. Thus, for example, the rate for a 25 word MAILGRAM which is sent from a teleprinter would be approximately $1.05. The rate for a 60 word MAILGRAM similarly sent would be approximately $1.50. Moreover, should additional MAILGRAM Services or supplemental features of either an experimental or operational nature be developed by Western Union and the USPS, users of Hawaii MAILGRAMs can expect to receive these additional benefits.

Dedicated 110 baud channels will be used for delivery of MAILGRAMs from the MAILGRAM Center at Middletown to the Hawaii SPO. This is necessitated by the fact that the computer center

at Middletown is designed specifically to use only 110 baud channels for delivery of MAILGRAMs to all SPO's. In this connection, we note that the switched facilities of the international carriers provide connection over 50 baud Telex trunks to and from Hawaii. Thus, the switched, lower speed facilities of the international carriers cannot be used.

Both the use of higher speed 110 baud channels and the fact that those channels are dedicated result in a more efficient use of the computer center at Middletown. For example, the use of these dedicated channels eliminates the time which would be required to dial the numbers of the MAILGRAM printers at the SPO's and also eliminates the lost time ("guard time") between calls on a switched network. Further, the use of dedicated channels to the SPO's prevents the MAILGRAM load from adversely impacting the Telex network.

Moreover, we are able to use the same voice grade channel from which we derive the 110 baud channels to transmit the MAILGRAMs from the MAILGRAM Sub-Center in Hawaii to the MAILGRAM Center at Middletown. In this connection, we note that for billing purposes it is necessary to use separate trunk bundles for each carrier's subscribers, and consequently, MAILGRAMs inputted from those subscribers cannot transit the domestic Telex network. Further, the use of dedicated channels to Middletown will prevent unauthorized use of Western Union's other computer oriented services by teleprinters located in Hawaii.

With respect to Section 222 of the Communications Act, we have carefully analyzed that Section to determine whether

it would preclude the proposed MAILGRAM Service. We have found nothing in that section which would preclude such an operation.

Section 222 was added to the Communications Act more than a quarter of a century ago to permit Western Union to acquire Postal Telegraph Company. It does not by its terms prohibit Western Union from engaging in international telegraph operations. Section 222 provides that "Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of international telegraph operations theretofore carried on by any party to the consolidation or merger ..." (subsection 222(c)(2), emphasis added); but Section 222 does not preclude the merged carrier from ever again engaging in international telegraph operations.

MAILGRAM Service is a new innovative service provided only by Western Union under joint arrangements with the United States Postal Service and is manifestly not a type of operation "theretofore carried on." Moreover, the proposed service will be provided by means of satellite communications technology, a form of communications transmission which was not even in existence when Section 222 was enacted. Thus, the above quoted language would have to be strained incredulously to be interpreted as precluding Western Union from engaging in its proposed MAILGRAM Service.

Further, it is an accepted principle of statutory construction that a flat prohibition is to be narrowly construed. Thus, in the absence of any language in Section 222 which

precludes Western Union from embarking on a new international record communication service, that section cannot properly be construed as precluding such an operation.

Moreover, since under Section 214 of the Communications Act, the FCC would still have full authority to disallow Western Union from providing any type of international record service which it did not believe was in the public interest, it would be unreasonable to believe that Congress intended to preclude Western Union from engaging in all future types of international record service irrespective of the public benefits that a particular service would provide.

Indeed, we believe that the very recent Memorandum, Opinion and Order (FCC 72-229) issued March 17, 1972, by the Federal Communications Commission (FCC) in Docket No. 16495, is dispositive of this issue. In that Memorandum, Opinion and Order the FCC stated:

> That section [Section 222] prohibits consolidations (including acquisition of facilities) between an international telegraph carrier and a domestic telegraph carrier. It also required Western Union to divest its international telegraph operations as a condition for acquiring Postal Telegraph Company and thereby becoming the monopoly domestic telegraph carrier upon which other international telegraph carriers must depend for domestic pick-up and delivery or the bulk of their international telegraph traffic. <u>However, while Section 222 bars mergers or other facilities acquisitions between existing firms; it has little, if anything, to do with a carrier embarking on an entirely new and different venture of its own.</u> <u>fn./</u>
>
> <u>fn./</u> The Department of Justice takes a similar position in stating that its "Merger Guidelines" apply to the acquisition of existing firms and provide no normative guidance where, as here, <u>de novo</u> expansion is being considered.

(pp. 56 - 57; emphasis added)

Certainly, MAILGRAM Service must be construed as "an entirely new and different venture." Clearly, such a service is not precluded by Section 222 of the Communications Act.

In accordance with Section 63.01 of the Commission's Rules and Regulations, Western Union submits the following information in support of this application:

(A) The applicant's name and address is the Western Union Telegraph Company, 60 Hudson Street, New York, New York, 10013.

(B) Western Union is a corporation organized under the laws of the State of New York.

(C) Correspondence pertaining to this application should be addressed to:

P. J. Schenk, Group Vice President
R. W. Stone, Assistant Vice President
The Western Union Telegraph Company
7916 Westpark Drive
McLean, Virginia 22101

with a copy to:

Jack Werner
David Lubetzky
The Western Union Telegraph Company
Suite 1001
1828 L Street, N. W.
Washington, D. C. 20036

(D) Western Union is engaged in providing a variety of communications services and is a common carrier subject to Section 214 of the Communications Act, as well as a "communications common carrier" as defined in the Communications Satellite Act of 1962.

(E) The proposed facilities will be used to extend the existing Western Union facilities on the Mainland to the State of Hawaii for the provision of MAILGRAM Service.

(F) The proposed facilities are to be located between the following points:

(1) For inbound MAILGRAMs from Hawaii to the Mainland (and for the servicing of MAILGRAM messages), the proposed facilities will connect the Western Union MAILGRAM Sub-Center in Honolulu to the Western Union ISCS Computer Center at Middletown, Virginia.

(2) For outbound MAILGRAMs from the Mainland to Hawaii, the proposed facilities in addition to connecting the MAILGRAM Sub-Center in Honolulu and the ISCS Computer Center at Middletown, will connect the Western Union MAILGRAM Sub-Center in Honolulu to a Serving Post Office (SPO) in Honolulu, Hawaii.

(G) Western Union has no existing facilities between the above stated points, except to the extent that it has microwave facilities between Middletown, Virginia and San Francisco, California.

(H) The facilities for which authority is requested are:

(1) One satellite voice grade circuit (from which four 110 baud circuits and twelve 50 baud circuits will be derived) between the Jamesburg, California earth station and the Paumalu, Hawaii earth station via an appropriate satellite [see (K)(1)].

(2) One voice grade circuit (from which four 110 baud circuits and twelve 50 baud circuits will be derived) between the Jamesburg earth station and San Francisco, California.

(3) One voice grade circuit (from which four 110 baud circuits and twelve 50 baud circuits will be derived) between San Francisco, California and the Middletown, Virginia ISCS Computer Center. This circuit will be derived from existing channel capacity over the Western Union microwave system.

(4) One voice grade circuit (from which four 110 baud circuits and twelve 50 baud circuits will be derived) between the Paumalu, Hawaii earth station and the Western Union MAILGRAM Sub-Center in Honolulu.

(5) Three 110 baud trunks between the Honolulu

MAILGRAM Sub-Center and the SPO in Honolulu.

(6) Standard Western Union channel multiplexing equipment at the Middletown, Virginia ISCS Computer Center and at the Honolulu, Hawaii MAILGRAM Sub-Center to be used for subdividing the voice grade circuit between these points into four 110 baud circuits and twelve 50 baud circuits.

(I) Western Union's present and estimated future channel requirements are detailed in Attachment No. 3. Western Union contemplates no rerouting of traffic now handled on other facilities to the facilities that are the subject of this application.

(J) The proposed facility configuration is shown as Attachment No. 4.

(K) Western Union proposes to lease or purchase the following facilities:

	Monthly Cost	Annual Cost
(1) One satellite voice grade circuit between the Jamesburg and Paumalu earth stations from the Communications Satellite Corporation (Comsat) in accordance with its Tariff F.C.C. No. 1. (It is		

		Monthly Cost	Annual Cost
	proposed to lease these facilities from Comsat only until such time as Western Union is authorized to construct a domestic satellite system and such Western Union system becomes operational.)	$5,400.00	$64,800.00
(2)	One voice grade circuit (88 miles) between the Jamesburg earth station and San Francisco from the Bell Telephone System pursuant to its intercarrier agreements with Western Union. (The costs shown are based on the intercarrier agreements between Pacific Telephone & Telegraph Company and Western Union.)	$ 92.00	$ 1,104.00
(3)	Local Inter-Office Section (4)	3.00	36.00
(4)	One voice grade circuit between the Paumalu earth station and Honolulu (25 miles) from the Hawaiian Telephone Company. (While the estimated costs for these facilities		

		Monthly Cost	Annual Cost
	are based on that Company's Tariff Hawaii P.U.C. No. 4, Western Union is hopeful of negotiating an intercarrier agreement which will reflect lower facility costs.)	$ 126.00	$ 1,512.00
(5)	Local Inter-Office Section (4)	21.00	252.00
(6)	Terminal Loops (3)	39.00	468.00
(7)	Multiplexing and other terminal equipment at Honolulu, Hawaii and Middletown, Virginia at an estimated installed cost of $55,943. This equipment will be depreciated on a straight-line basis over a 20-year life.	233.00	2,797.00

(L) The substantial public need for the facilities required for the proposed extension of the MAILGRAM Service to Hawaii is set forth in the text preceding the lettered paragraphs.

(M) As shown on Attachment No. 5 the estimated added revenues substantially exceed the estimated added costs. This is summarized as follows:

Year	Volume	Added Revenues	Added Costs	Revenues Over Costs
1	130,000	$ 195,000	$201,260	$(6,260)
2	430,000	$ 645,000	$370,091	$274,909
3	900,000	$1,350,000	$523,402	$826,598

(N) Neither MAILGRAM Service nor a similar service is presently provided by Western Union or others in the area to be served by the proposed facilities. The USPS furnishes mail services between Hawaii and the Mainland, however, no mail services of similar character are now being furnished. This is clearly evidenced by the participation of USPS in the handling and delivery of MAILGRAMs. Whereas all forms of telephone, telegraph and other established telecommunications services presently serve this area, no such telecommunications services are similar in character to MAILGRAM Service.

(O) Except for the inclusion of tariff provisions relating to the interconnection arrangements to be negotiated with other carriers, MAILGRAM Service between the Mainland and Hawaii will be incorporated into Western Union's Tariff F.C.C. No. 256 covering MAILGRAM Service at the same regulations set forth in said tariff. The proposed rates are as follows:

	Charge Per MAILGRAM
Part I (Between the Mainland and Hawaii)	
- Service Charge	$ .75
- Usage Charge (per one-tenth minute)	$ .075
Part II (From the Mainland to Hawaii)	
- For 600 characters or less	$1.25
- For each additional 600 characters or less	$ .25
Part III (From the Mainland to Hawaii)	
- For 100 words or less	$2.05
- For each additional 100 words or less	$ .80

As there are no functional cost differences associated with extending the availability of MAILGRAM Service to Hawaii as opposed to serving any other State in a nation-wide rate pattern, it is proposed to integrate the MAILGRAM rates between Hawaii and the Mainland into the general domestic rate pattern presently applicable to the Mainland. However, a higher additional charge will apply to each MAILGRAM to reflect only those added costs associated with the fact that Hawaii is a non-contiguous State separated from the Mainland.

Attachment No. 6 shows the estimated facility and operational costs which result from Hawaii being separated from the Mainland. This

Attachment also shows the estimated MAILGRAM usage between Hawaii and the Mainland, and the additional revenue requirement of 45¢ per MAILGRAM message for the first three years of service.

Attachment No. 7 shows the present domestic MAILGRAM rates. For Parts II and III, the rate shown is a "postalized" rate, i.e., the same rate applies regardless of the distance between originating and destination points. Thus, it is proposed to apply the 45¢ additional per message charge to the initial minimum charge. With respect to Part I MAILGRAMs, the present domestic rate shown on Attachment No. 7 is the "average" rate. As summarized on this Attachment, Part I rates consist of two elements, a service charge of 75¢ per MAILGRAM and a usage charge which varies on the basis of "time", "speed" and "distance" but averages approximately 30¢ per message. To ease customer understanding and minimize the number of processing and billing operations at the Middletown ISCS Computer, it is proposed to apply a usage charge which varies only on the basis of "time" between Hawaii and the Mainland. Thus, as MAILGRAMs between Hawaii and the Mainland are expected to exhibit the same usage

characteristics as present domestic MAILGRAMs, the addition of the 45¢ cost increment results in a total average usage charge for Hawaii MAILGRAMs of 75¢. To conform with the present domestic usage rate structure, the usage charge will be applied in increments of 1/10 minute at a charge of 7.5¢ for each 1/10 minute.

With respect to the effect on the end-to-end rate levels of the interconnecting arrangements proposed with other carriers, Western Union believes that the costs associated with such teleprinter inputs should exhibit the same characteristics as the costs associated with regular domestic teleprinter inputs. That is, the costs attributable to the teleprinter, the local loop, and related switching equipment will be similar whether Western Union or another Carrier provides them. Consequently, to the extent that the cost to Western Union for the interconnection arrangements reflect such similar costs, they are included in the general domestic rate pattern, i.e., the base rate.

Western Union is aware that the present MAILGRAM Service is still experimental. It intends, however, to take appropriate actions

with regard to making MAILGRAMs permanent and to support such tariff proposals. In the interim, Western Union believes that the benefits of the proposed MAILGRAM extension to Hawaii should not be denied that State by virtue of the present experimental MAILGRAM classification.

(P) Accounting will be performed in accordance with Part 35 of the Commission's Rules and Regulations.

WHEREFORE, The Western Union Telegraph Company respectfully submits that the public convenience and necessity would be served by the grant of this application.

Respectfully submitted,

THE WESTERN UNION TELEGRAPH COMPANY

By _____
P. J. Schenk, Group Vice President

By _____
R. W. Stone, Assistant Vice President
The Western Union Telegraph Company
7916 Westpark Drive
McLean, Virginia 22101

By _____
Jack Werner

By _____
David H. Lubetzky
The Western Union Telegraph Company
Suite 1001
1828 L Street, N. W.
Washington, D. C. 20036

Its Attorneys

April 4, 1972

ALEXANDER & BALDWIN INC.

822 BISHOP STREET · HONOLULU · HAWAII
TELEPHONE 536-3941 · TELEGRAPH ALEXAND

WILLIS R. DEMING
Vice President, Secretary
and General Counsel

March 30, 1972

Mr. Russell W. McFall
Chairman of the Board
Western Union Corporation
60 Hudson Street
New York City, New York

Dear Mr. McFall:

It has come to our attention that Western Union Corporation and the U.S. Postal Service are operating a "Mailgram" communication service on the mainland and that consideration is being given to establishing Mailgram communication service between Hawaii and the mainland.

We maintain constant communications between our offices in Hawaii and those of our subsidiaries on the mainland, and also between our offices in Hawaii and the offices of stockholders, business firms, and governments on the mainland. Your Mailgram Service appears to be a service that we could use and it would fill a definite need in the conduct of our business.

Please advise us when your Mailgram Service has been established between Hawaii and the mainland so that we may use it in our business.

Very truly yours,

Willis R. Deming

Willis R. Deming

WRD:ka

A90



chamber of commerce of hawaii

established 1850

March 30, 1972

Mr. Russell W. McFall
Chairman of the Board
Western Union Corporation
60 Hudson Street
New York City, N.Y.

Dear Mr. McFall:

Fast, efficient and economical communications services are vital factors in the mainterance and growth of any economy, but they are especially important to the State of Hawaii. Our distance from the principal centers of government, industry and finance, and the attendant time differences make this so.

It has come to our attention that MAILGRAM Service between Hawaii and the Mainland is under consideration. The extension of this improved service to Hawaii would be a matter of great interest to the members of the Chamber of Commerce of Hawaii for it would provide them with alternatives already available to their Mainland counterparts.

We would appreciate being kept advised of your plans in the interest of both our membership and the community.

Sincerely,

C. J. Cavanagh
President

CJC/af

[illegible] Beverly Hills [illegible] · CALIFORNIA

March 31, 1972

Mr. Russell W. McFall
Chairman of the Board
Western Union Corporation
60 Hudson Street
New York City, New York

Dear Mr. McFall:

I have followed with interest the Mailgram Service that you established with the U. S. Postal Service some months ago.

As a group of companies that depend a great deal on communications for our operation, the system of communication you offer should fit well with our operations in Hawaii, Alaska and on the mainland.

I would appreciate a complete description of the Mailgram Service, with your timing as to when you will extend service to Hawaii, so that it can be distributed to the various companies in my group.

Very truly yours,

G. R. Hansen
Group Vice President

GRH/nn

HENRY A. ALEXANDER & COMPANY, INC.
MANAGEMENT CONSULTANTS

Suite 614, Alexander Building
700 Bishop Street
Honolulu, Hawaii 96813
Telephone 521-1702

March 31, 1972

Mr. Russell W. McFall
Chairman of the Board
Western Union Corporation
60 Hudson Street
New York City, New York

Dear Mr. McFall:

Our organization has followed with great interest the new Mailgram Service introduced jointly by your company and the U. S. Postal Service some twenty-four months ago. Based upon our understanding of the new Mailgram Service, we are convinced that the Mailgram Service could fill a much needed gap in the exchange of record communication between the mainland and Hawaii for our clients on both sides of the water.

As management consultants we work closely with many different businesses and industries. We believe that the Western Union Mailgram Service could be of material assistance to agricultural, food processing, manufacturing, and distribution companies with which we are familiar.

We would enjoy having a comprehensive description of Mailgram Service for use with our clients, and some indication as to your plans to develop the extension of Mailgram Service to Hawaii.

Yours truly,

Henry A. Alexander

Henry A. Alexander, President
HENRY A. ALEXANDER & COMPANY, INC.

Attachment No. 2

For further information call:
(202) 961-8663

ADVANCE FOR USE AT 6:30 P.M. EST
MONDAY, MARCH 27, 1972

GENERAL RELEASE NO. 27

The U. S. Postal Service and Western Union Telegraph Company today announced the signing of a long-term, open-ended agreement providing continuation of the MAILGRAM service.

The period of the new MAILGRAM contract is for two years, with a provision that the agreement will remain in effect thereafter unless terminated by either party after a one-year notice.

Postmaster General E. T. Klassen and Western Union President Earl D. Hilburn praised the success of the MAILGRAM program and said the service will be extended beyond the contiguous 48 states.

MAILGRAM, which combines the convenience of mail delivery with the speed of electronic transmission, has been provided the past two years under a joint, experimental test by the Postal Service and Western Union.

Mr. Klassen said:

"The U. S. Postal Service intends to continue to work closely with the Western Union Telegraph Company to expand MAILGRAM service for both business users and the general public within the 48 contiguous states where MAILGRAM is now available, and through cooperation with

(more)

other common carriers as appropriate to extend the service as soon as possible to Alaska, Hawaii and Puerto Rico."

Mr. Hilburn said Western Union will continue its ten-year, multi-million dollar investment program for computerized message switching equipment and teleprinter equipment used in MAILGRAM.

MAILGRAM uses the telegraph company's facilities for acceptance and electronic transmission of messages for next business day delivery nationwide by postal carriers. Teleprinters are located at selected post offices.

As part of Western Union's modernization program, a new computer switching facility at Middletown, Virginia, began processing TWX and TELEX input MAILGRAM messages on March 1, 1972, approximately 30 days ahead of schedule. The transfer of all MAILGRAM traffic to the new Middletown facility from Mahwah, New Jersey, is being accomplished in stages and will be completed by May 1, 1972.

Monitoring of the MAILGRAM network nationwide has shown that 99.5% of the messages are delivered on a next-day basis. Since the experiment began January 1, 1970, MAILGRAM has gained increasing public acceptance, reaching a level of over 20,000 messages transmitted daily nationwide.

###

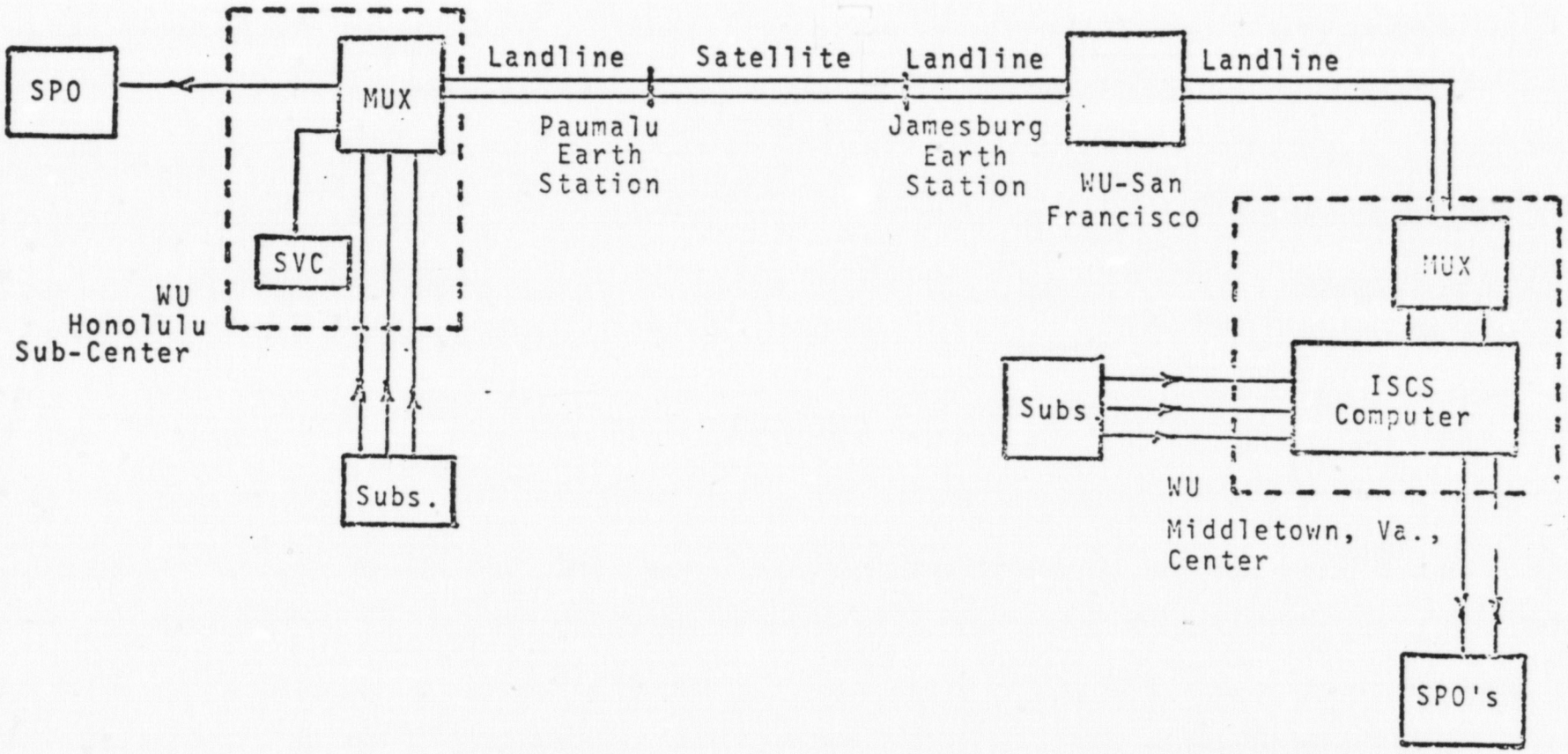
Attachment No. 3

HAWAII/MAINLAND MAILGRAM

ESTIMATED PRESENT AND FUTURE CHANNEL REQUIREMENTS

	REQUIREMENTS AT END OF YEAR		
	One	Two	Three
Leased Voice Grade Channel			
- Jamesburg Earth Station to San Francisco	1	2	2
- Inter-Office Sections	4	8	8
Leased Satellite Voice Grade Channel			
- Jamesburg Earth Station to Paumalu, Hawaii	1	2	2
Leased Voice Grade Channel			
- Paumalu Earth Station to Honolulu	1	2	2
- Inter-Office Sections	4	8	8
Leased Terminal Loops For 110 Baud SPO Circuits	3	5	6

HAWAII/MAINLAND MAILGRAM - FACILITIES CONFIGURATION



HAWAII/MAINLAND MAILGRAM - ADDED REVENUES & COSTS

1. Estimated Added Revenues

The estimated added MAILGRAM volumes and revenues between Hawaii and the Mainland are as follows:

Year	Volume	Added Revenue
1	130,000	$ 195,000
2	430,000	645,000
3	900,000	1,350,000

The volume estimates are based on Western Union's experience to date with the MAILGRAM market. Since the inauguration of MAILGRAM, data has been developed and analyzed relating to demand and resulting market penetration. For estimate purposes, the most reliable data relates Part I MAILGRAM growth to the number of Telex terminals in each acceptance city, i.e., a measure of volume expressed as "penetration per drop". The estimates used for MAILGRAMS accepted in Hawaii assume that this type traffic will exhibit the same penetration characteristics as existing MAILGRAM traffic has experienced in the average of the best performing test cities, i.e., .8 MAILGRAMS per drop per day.

The market penetration value of .8 MAILGRAMS per drop per day is based on the average first year performance of the six best performing cities of the original twelve test cities, i.e., Atlanta, Boston, Cincinnati, Dallas, Denver and Kansas City. Western Union's present pricing structure and its increased expertise in the marketing of MAILGRAM suggest that future markets will develop as did these original six test cities. This should be particularly true for a concentrated market area such as Hawaii where there is a close community of interest with the Mainland.

Volume forecasts were derived from the following schedule which relates different market penetration levels to terminals depending on the time (in years) they are exposed to MAILGRAM Service. Accordingly, terminals for which MAILGRAM is available for one year will account for .8 MAILGRAMS per drop per day; two years, 1.3 penetration and three years, 1.7 penetration.

Year 1 Terminals	No. Terminals*	End Year Penetration	Volume
1st Year Operation	1,000	.8	65,000
2nd Year Operation	1,000	1.3	200,000
3rd Year Operation	1,000	1.7	375,000
Year 2 Terminals			
1st Year Operation	-	-	-
2nd Year Operation	250	.8	15,000
3rd Year Operation	250	1.3	60,000
Year 3 Terminals			
1st Year Operation	-	-	-
2nd Year Operation	-	-	-
3rd Year Operation	250	.8	1 ,000
Total			
1st Year Operation	1,000	-	65,000
2nd Year Operation	1,250	-	215,000
3rd Year Operation	1,500	-	450,000

* Estimate is based upon the number of other carrier terminals currently in service and anticipated growth.

The penetration value of 1.3 MAILGRAMS per drop per day for the second year was also developed by examining sets of high performance test cities in 1971 (the second year of Mainland MAILGRAM Service). The penetration value of 1.7 for the third year is an estimate based on a decreasing rate of increased penetration from a trend abstracted from Western Union's experience with regard to the current U.S. market in 1972

The relation between end year penetration levels and total annual volume is linked by growth curves that alter in slope and shape dependent upon time such that, as time increases, the curvilinear slope of the growth pattern approaches lincarity.

The above determined volume estimates relate to MAILGRAM messages from Hawaii to the Mainland. An investigation of traffic patterns for other communications modes in present use between the Mainland and Hawaii, i.e. telephone telex and telegraph, reveal an approximately equal distribution of traffic in each direction. The above one-way volume estimates are, therefore, multiplied "times two" to arrive at the total volumes between the Mainland and Hawaii.

The total MAILGRAM volumes for each year are then applied to the "average" Part I MAILGRAM rate of $1.50, see response to (O), to determine total added revenues. As experience to date with Part II and III MAILGRAM volumes and revenues is not considered indicative for future projections, the estimate is considered conservative to the extent that such volumes and revenues are omitted.

Estimated Added Costs

The estimated added costs associated with the provision of MAILGRAM Service between the Mainland and Hawaii are as follows:

	Year 1	Year 2	Year 3
Initial Investment & Annual Additions			
Labor	$13,000	$ 6,816	$1,568
Material	37,539	14,102	5,311
Other Disbursements	8,636	4,383	732
Total Direct Costs	$59,175	$25,301	$7,611
Annual Charge and Expenses			
Leased Circuitry	$ 68,172	$136,188	$136,344
Operations	62,828	70,328	81,453
Maintenance	17,878	18,065	18,156
Rent	6,600	6,600	6,600
Depreciation	3,772	5,450	5,946
Other	3,010	4,460	4,903
Total	$162,260	$241,091	$253,402
USPS Payment	$ 39,000	$129,000	$270,000
Total Added Costs	$201,260	$370,091	$523,402

The above costs exclude any interconnection payments to be negotiated with other carriers to the extent that such payments are considered an added cost related to economic justification.

HAWAII/MAINLAND MAILGRAM - ESTIMATED COSTS & REVENUE REQUIREMENT

Associated with Separation from Mainland

	Year 1	Year 2	Year 3	Three Year Total
Initial Investment & Annual Addition				
Direct Costs including labor, material and other disbursements associated with installation of equipment	$43,866	$15,095	$ 2,508	$ 6
Indirect Costs including plant supervision, supply expense, employee benefits, and interest during construction	$12,077	$ 5,276	$ 749	$ 18
Net Cost In Place	$55,943	$20,371	$ 3,257	$ 79
Net Investment (Rate Base)	$48,610	$66,052	$68,849	Appl
Annual Charges and Expenses				
Depreciation	$ 2,797	$ 3,816	$ 3,979	$ 1
Leased Circuitry	67,704	135,408	135,408	33
Other Expenses including maintenance, fixed charges, operating labor and building lease	85,536	86,593	86,830	25
Total Annual Costs	$156,037	$225,817	$226,217	$60
Return and FIT	$ 8,750	$ 11,889	$ 12,393	$ 3
Revenue Requirement	$164,787	$237,706	$238,609	$6

The estimated MAILGRAM usage between the Mainland and Hawaii is explained on attachment No. 5 and is summarized as follows:

Year 1	Year 2	Year 3	Three Year Total
130,000	430,000	900,000	1,460,000

The application of these usage estimates to the previously indicated revenue requirement results in the following estimated revenue requirement per MAILGRAM message for the first three years:

Year 1	Year 2	Year 3	Three Year Total
$ 1.267	$ .553	$ .265	$ .439
			(Say 45¢)

ttachment No. 7

HAWAII/MAINLAND MAILGRAM - PRESENT MAINLAND RATES

(From Tariff F.C.C. No. 256)

	Charge Per MAILGRAM
Part I	
- Service Charge	$ .75
- Usage Charge	$ .30*
Part II	
- For 600 characters or less	$ .80
- For each additional 600 characters or less	$ .25
Part III	
- For 100 words or less	$1.60
- For each additional 100 words or less	$ .80

* Based on 1971 MAILGRAM volume of 2,686,270 and MAILGRAM usage revenue of $832,744.

A104

THE WESTERN UNION TELEGRAPH COMPANY

OFFICE OF THE GENERAL COUNSEL
REGULATORY DIVISION
1828 L STREET, N. W., (SUITE 1001)
WASHINGTON, D. C. 20036
(202) 296-2360

RICHARD C. HOSTETLER
GENERAL COUNSEL

JACK WERNER
SPECIAL COUNSEL

April 13, 1972

Mr. Ben F. Waple
Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Re: Western Union application, filed April 4, 1972, for authority to extend MAILGRAM Service between the United States Mainland and Hawaii.

Dear Mr. Waple:

On page 7 of the above-referenced application, reference is made to a Memorandum Opinion and Order (FCC 72-229), issued March 17, 1972. The reference should more appropriately have been to the attachment to that MO&O which is a proposed Second Report and Order recommended by the Chief, Common Carrier Bureau. We apologize for any inconvenience this inadvertence may have caused.

Respectfully submitted,

David H. Lubetzky

David H. Lubetzky

COMMON CARRIER BUREAU

APR 14 1972

INTERNATIONAL
COMMUNICATIONS DIVISION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED BY FCC
APR 17 1972
MAIL BRANCH

In the Matter of	)
	)
WESTERN UNION TELEGRAPH COMPANY	)
	)
Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Extend MAILGRAM Service Between the United States Mainland and Hawaii	)

PETITION TO REJECT

ITT World Communications Inc. (ITT Worldcom) hereby requests that the Commission reject the application filed by Western Union Telegraph Company (Western Union) for authority pursuant to Section 214 of the Communications Act of 1934, as amended, (Communications Act) to extend its MAILGRAM Service between continental United States and Hawaii on the grounds that the authority requested is beyond the power of the Commission.

The proposed MAILGRAM service would involve the use of 110-baud channels between the MAILGRAM center in Middletown, Virginia and the Serving Post Office (SPO) in Hawaii where messages would be received on a teleprinter and delivered to their ultimate destination by a postal carrier. MAILGRAMS would be accepted from all Telex, TWX and INFOCOM locations. Clearly, the service described by Western Union is a telegraph service. Even, the name given to this service, MAILGRAM, instead of telegram, is designed to

convey to the public the image of a message similar to the telegram. Such service can hardly be classified as "an entirely new and different venture".[1/] The only features which distinguish this service from normal domestic telegraph service is that teleprinters are located in the SPO and delivery is accomplished by postal carriers - "a distinction without a difference".[2/]

In Telegraph Service With Hawaii,[3/] Docket No. 13188, a decision rendered after Hawaii became a state, the Commission said:

> "Western Union secondly argues that since in its view Section 222 does not clearly and explicitly provide that service with Hawaii is an international telegraph operation, we should not interpret it as such because this interpretation would deprive us of power to permit or order such Western Union service even though it were required by the public interest...We cannot agree with Western Union's position...The history and purposes of Section 222 do not give rise to doubts as to meanings, but require an interpretation opposite to that advocated by Western Union. Since this is so, it appears that Western Union is suggesting that we exercise a power we do not have, namely, to authorize Western Union service with Hawaii as a domestic telegraph operation" (emphasis added)[4/]

1/ Western Union Application, p.8

2/ Fielding, Tom Jones, Book VI, Ch.13

3/ 28 F.C.C. 599 (1960)

4/ 28 F.C.C. 599, 605

The Commission in the same decision dismissed the argument that preventing Hawaii from receiving Western Union's telegraph service would contravene the Hawaii Statehood Bill which admitted Hawaii to the Union on an "equal footing with the other states of the Union," saying: 5/

> "Even assuming that this language applies to telegraph service, it appears to us that Western Union misreads it, so as to convert a right given to Hawaii into a benefit to Western Union, by arguing that one of the perquisites of statehood is the right to telegraph service by Western Union domestic operations." 6/

In Telegraph Service With Hawaii, the Commission also decided that it should not recommend legislation to Congress which would permit Western Union to serve Hawaii as a domestic telegraph operation, and commented:

> "...we do not believe that the Western Union proposals offer present or foreseeable benefits to override, with respect to Hawaii, the considerations which originally led to the establishment of the presently existing area of service." 7/

Western Union cites in support of the requested authority the Memorandum, Opinion, and Order, released March 7, 1972 in Docket No.16495 dealing with domestic satellites in which the Commission stated:

> "...while Section 222 bars mergers or other facilities acquisitions between existing firms;

5/ Pub. L-86-3, 7. Stat. 4 (1959)

6/ 28 F.C.C. 599, 606

7/ 29 F.C.C. 599, 615

> it has little, if anything, to do with a carrier embarking on an entirely new and different venture of its own." 8/

However, Western Union conveniently ignores the portion of the decision, which appears six lines below the quotation relied on by it, in which the Commission stated:

> "In the event we determine as a matter of policy that Hawaii should be included in a domestic system, there would seem to be no warrant for disqualifying Western Union alone from having any earth station interest there, particularly if the principal use of the earth station is for television program reception and other specialized services and Western Union is precluded from providing telegraph service between Conus and Hawaii." (Emphasis added) 9/

In view of the foregoing, it is clear that Section 222 of the Communications Act effectively bars the authority requested by Western Union and its application should be rejected summarily.

Respectfully submitted,

ITT WORLD COMMUNICATIONS INC.

By:

Howard A. White

Joseph J. Jacobs

Its Attorneys
67 Broad Street
New York, N.Y. 10004

Dated: April 13, 1972

8/ 37 Fed. Reg. 5866, 5883 (1972)

9/ Ibid

A109

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)
	)
THE WESTERN UNION TELEGRAPH COMPANY	)
	)
Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Lease and to Operate Facilities to Extend MAILGRAM Service Between the United States Mainland and Hawaii	)

To: The Commission

APPLICATION FOR REVIEW OF ACTION

TAKEN PURSUANT TO DELEGATED AUTHORITY

Richard C. Hostetler
60 Hudson Street
New York, N. Y. 10013

Jack Werner
David H. Lubetzky
1828 L Street, N. W.
Suite 1001
Washington, D. C. 20036

Attorneys for
The Western Union Telegraph Comp

May 19, 1972

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)
	)
THE WESTERN UNION TELEGRAPH COMPANY	)
	)
Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Lease and to Operate Facilities to Extend MAILGRAM Service Between the United States Mainland and Hawaii.	)

To: The Commission

APPLICATION FOR REVIEW OF ACTION
TAKEN PURSUANT TO DELEGATED AUTHORITY

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IV. EVEN ASSUMING, ARGUENDO, THAT SECTION 222 PRECLUDES WESTERN UNION FROM PROVIDING THE TYPES OF INTERNATIONAL TELEGRAPH OPERATIONS CARRIED ON AT THE TIME THE SECTION WAS ENACTED, IT CERTAINLY CANNOT VALIDLY BE INTERPRETED AS PRECLUDING WESTERN UNION FROM PROVIDING NEW INTERNATIONAL TELEGRAPH SERVICES SUCH AS AN INTERNATIONAL MAILGRAM SERVICE 20

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)
	)
THE WESTERN UNION TELEGRAPH COMPANY	)
	)
Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Lease and to Operate Facilities to Extend MAILGRAM Service Between the United States Mainland and Hawaii.	)

To: The Commission

APPLICATION FOR REVIEW OF ACTION
TAKEN PURSUANT TO DELEGATED AUTHORITY

The Western Union Telegraph Company (Western Union) pursuant to Section 1.115 of the Commission's Rules hereby applies to the Commission for review of the determination made by the Common Carrier Bureau that Section 222 of the Communications Act prohibits Western Union from leasing and operating facilities between the United States Mainland and the State of Hawaii for the purpose of extending its Mailgram service to Hawaii. The Bureau rendered its opinion in a letter dated April 19, 1972, in which it stated that it could not accept the above-captioned application for filing because it believed that Section 222 of the Communications Act prohibits Western Union from providing such service, and that therefore the Commission has no authority to grant the application even if it were considered to be in the public interest. Western Union requests that the Commission review and reverse

the Bureau's interpretation of Section 222 and direct the Bureau to accept its application for consideration on its merits.

Commission review is clearly warranted in this case because the Bureau has read into Section 222 a very pervasive restriction on Western Union's operations which is not justified by the statute's language. Concomitantly, the Bureau's reading of Section 222 would appear to preclude the Commission from authorizing Western Union to provide any service which can be construed as an international telegraph service even if such a service would provide substantial public benefits.

In the instant case, the Bureau's erroneous interpretation of Section 222 would preclude Western Union from leasing and operating overseas facilities for the sole purpose of extending its Mailgram service to overseas points despite the fact that Mailgram service is a new innovative service pioneered by Western Union in conjunction with the United States Postal Service; despite the fact that Western Union has made a substantial financial commitment in Mailgram service; and despite the fact that no other communications carrier presently provides such a service, or is even capable of providing such a service with the public interest benefits proposed in the Western Union application. Failure to allow Western Union to extend its Mailgram service to the State of Hawaii and other overseas points would appear to result in the public having to pay much higher rates for similar services because of the high rate level of the international record carriers. Thus, a comparison of the rates proposed by Western Union for Hawaii Mailgram service (which are fully cost supported as shown in

Western Union's application) with those for similar services proposed by RCA Global Communications, Inc. (RCA Globcom) and Western Union International, Inc. (WUI) from their gateway cities reveals that, depending upon the length of the message, the international record carriers (both of which propose identical charges) plan to charge the public from at least 50% to over 150% more than would Western Union. */ As is readily apparent, the Bureau's interpretation of Section 222 involves an important question of law with important consequences for both Western Union and the public, and consequently, is deserving of Commission review.

I.

THE BASIC ISSUE

In essence, the basic issue presented is whether a statutory provision (Section 222) enacted in 1943 which required Western Union to divest itself of its "international telegraph operations theretofore carried on" can be interpreted so expansively as to preclude the Commission, many years after the divestiture, from authorizing Western Union to provide an international telegraph service even if such a service clearly is in the public interest. As demonstrated below, it is clear that if Congress had intended to preclude Western Union eternally from

---

*/ Compare the rates proposed by Western Union in its application submitted on April 4, 1972 (page 15) with those proposed by RCA Globcom in its application filed on May 10, 1972 (page 9 of its proposed tariff which is attached), and WUI in its application filed May 4, 1972 (page 9 of Attachment F).

providing an international telegraph service, it would have explicitly provided so in the statute. Consequently, the language of the divestment provision cannot be interpreted as depriving the Commission of its Section 214 authority to authorize Western Union to provide an international telegraph operation if it finds such an operation to be in the public interest.

II.

BACKGROUND OF SECTION 222

As the Bureau noted, Section 222 was added to the Communications Act in 1943 to permit Western Union to acquire Postal Telegraph which was in imminent danger of failure. As the Bureau also noted, Section 222 was basically an outgrowth of a comprehensive study of the telegraph industry (which included extensive hearings in which the Commission played a major role) by the Senate Committee on Interstate Commerce. A report of that study entitled "Study of the Telegraph Industry" (S. Rept. 769, 77th Cong., 1st Sess.) was submitted to the Senate on October 28, 1941. The report recommended that legislation be passed which would allow the domestic telegraph carriers to merge and the international telegraph carriers to merge, but would not allow the domestic telegraph carriers to merge with the international telegraph carrriers. The report also recommended, in effect, that if Western Union acquired

Postal Telegraph it should not have to divest itself of its international telegraph operations. Some of the specific recommendations of that report are as follows:

> "1. That the Congress approve an amendment to the Communications Act of 1934 permitting--
>
> "(a) Domestic American telegraph carriers to merge; and
>
> "(b) International American telegraph carriers to merge; but with
>
> "(c) A proviso that there should be no merger between or common control of domestic and international communications carriers but permitting a merger of domestic carriers into one entity and international carriers into a second and entirely separate and distinct entity; and
>
> "(d) The legislation should define 'domestic' and 'international' carriers and shall not prevent the inclusion of all existing operations of any domestic carrier, which may be engaged partially in international telegraph communications, into the merged domestic enterprise, and shall empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations if found to be in the public interest; and
>
> "(e) There should be no requirement that the domestic or international mergers be carried out simultaneously; . . . " (S. Rept. 769, p. 25, supra; emphasis added)

The initial bill which was proposed in the Senate (S. 2445) followed the above recommendations with the exception that it did not follow the recommendation underlined above which would not have required Western Union to divest itself of its international telegraph operations as a condition of acquiring Postal Telegraph.

Subsequent Senate bills (S. 2598 and S. 158) retained the divestment provision but deleted the provision which would have

permitted the international telegraph carriers to merge. The principal reason for this deletion was the urging of the Navy Department that legislation permitting such a merger not be passed during World War II (see S. Rept. 13, 78th Cong., 1st Sess., p. 7). When those Senate bills were referred to the House, the House amended those bills so as to, among other things, delete the divestment provision (see H. Rept. 69, 78th Cong. 1st Sess., p. 2).

Section 222 as enacted was a result of a compromise worked out by the conference committee. As part of the compromise the House acquiesced to the provision of the Senate bill which required divestment. The relevant portions of the Conference Report (H. Rept. 142, Conference, 78th Cong., 1st Sess.) dated February 18, 1943, are as follows:

"STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

"The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 158) to amend the Communications Act of 1934, as amended, to permit consolidations and mergers of domestic telegraph carriers, and for other purposes, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

"The House amendment struck out all of the Senate bill after the enacting clause. The committee of conference recommends that the Senate recede from its disagreement to the amendment of the House, with an amendment which is a substitute for both the Senate bill and the House amendment, and that the House agree to the same.

"The differences between the House amendment and the proposed conference substitute are noted in the following statement, except for incidental changes made necessary by reason of agreements reached, and minor clarifying changes:

"PROVISIONS OF THE PROPOSED NEW SECTION 222 OF THE COMMUNICATIONS ACT OF 1934

. . . . .

"DIVESTMENT OF INTERNATIONAL OPERATIONS

"Paragraph (2) of subsection (c) is a provision taken from the Senate bill, and no similar provision was contained in the House bill. It provides that any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission must require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can.

"Consideration was given to the inclusion of such a provision while the bill was under consideration by the House committee. It was felt that such divestment would be desirable in the public interest, but in view of certain existing long-term contracts it was felt impracticable to require such action to be taken at this time. However, it is believed that the provision included in the conference substitute will provide for the divestment of such operations without working undue hardship on the companies involved." [Conference Report, pp. 10 and 11]

There is no suggestion in the Conference Report that the compromise bill was intended to preclude Western Union from ever again engaging in international telegraph operations, or concomitantly, to deprive the Commission of its authority to authorize Western Union to provide an international telegraph service in the future, if it finds that such an operation would be in the public interest.

III.

SECTION 222 DOES NOT PRECLUDE THE COMMISSION FROM AUTHORIZING WESTERN UNION TO PROVIDE AN INTERNATIONAL TELEGRAPH SERVICE

A. There is no language in Section 222 which would preclude such an authorization.

There is no provision in Section 222 which can be validly construed as precluding the Commission from authorizing Western Union to provide all types of international telegraph services. The Bureau's very expansive interpretation of the divestment provision (Section 222(c)(2)) is just not warranted by the language of the statute. If Congress had intended to preclude Western Union from ever again providing an international telegraph service, it would have explicitly said so in the statute. Thus, Congress could have stated, e.g., that "Subsequent to the divestment, the merged carrier is precluded from providing any international telegraph operations." Alternatively, Congress could have provided that the merged carrier was to be precluded from providing any international telegraph operations for a stated period of years after the divestment was consummated.

In this context, we note that when a company is ordered by a court to divest itself of a particular operation, that company is not precluded from ever again engaging in that type of activity unless such a prohibition is specifically included in the Order.

Thus, for example, in Maryland & Virginia Milk Producers Association v. United States, 362 U.S. 458 (1960),

the Supreme Court discusses an antitrust decree fashioned by the district court which ordered the Association (a milk producing co-operative) to divest itself within a reasonable time of all assets acquired from Embassy Dairy (a milk distributor). The lower court, however, refused to grant the government's request to prohibit the Association from operating as a distributor in the Washington market for a period of time after the divestiture and to prevent the future acquisition of distributors by the Association without prior approval of the government (362 U.S. at 462, 472). It was patently clear to all parties that the divestment provision alone would not be an absolute bar to the Association engaging at a future date in the same type of activity that was engaged in by the company to be divested.

In United States v. Crescent Amusement Co., 323 U.S. 171 (1944), rehearing denied, 323 U.S. 818 (1945), the Supreme Court at 323 U.S. 188 (1945) discusses the divestiture provisions of a decree fashioned by the district court which required each corporate exhibitor to divest itself of the ownership of any stock or other interest in any corporate defendant (defined in the decree to exclude certain companies) and specifically enjoined it from acquiring any interest in those companies in the future. The court at 323 U.S. 186-187 revised the decree to also prohibit future acquisitions of a financial interest in additional theatres outside of Nashville except after an affirmative showing that such acquisition will not unreasonably restrain competition.

In Schine Chain Theatres v. United States, 334 U.S. 110 (1948), petition for clarification denied, 334 U.S. 831 (1948), the Supreme Court at 334 U.S. 126-127 discusses a decree fashioned by the district court, which, among other things, required Schine to sell its interests in all but one theatre of its selection in each of 33 towns and prohibited Schine from acquiring any financial interest in additional theatres except after an affirmative showing that such acquisition will not unreasonably restrain competition.

Similarly, in the present situation, in the absence of a specific prohibition against engaging in international telegraph operations in the future, the divestment provision cannot be construed to preclude all such operations for all time. Surely, if Congress had intended such drastic action, it could easily have so stated.

B. The Bureau completely misconstrues what it appears to consider to be the relevant portion of the legislative history.

In support of its position that Section 222 precludes Western Union from engaging in any future international telegraph operations, the Bureau cites what it appears to consider to be the relevant portion of the legislative history. However, even assuming that the language which the Bureau cites reflects the Congressional intent of the compromise bill which was eventually passed, the Bureau completely misconstrues the meaning of that language.

Thus, the Bureau appears to reason (at page 3 of its letter) that the intent of Section 222 is reflected by the recommendation of the Senate Committee on Interstate Commerce that Congress approve an amendment to the Communications Act that "shall empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations if found to be in the public interest."*/ (Emphasis added by the Bureau). Assuming that the Bureau is correct in its belief that that particular recommendation of the Senate Committee on Interstate Commerce reflects the intent of Section 222, this would support our position that Section 222 does not take away the Commission's discretion to make future determinations as to Western Union's role in international telegraph operations and not the Bureau's contrary position that Congress has taken this discretion away from the Commission. This is so because if the intent of Section 222 were to empower the Commission to require Western Union "to restrict itself solely to domestic telegraph operations if found to be in the public interest" (emphasis added), as the Bureau appears to contend, then surely Section 222 cannot be interpreted as taking away the Commission's discretion to authorize Western Union to provide international telegraph operations if the Commission believes that such operations are in the public interest. Thus, the very language relied upon by the Bureau indicates that the Commission

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*/ The pertinent recommendations of the Senate Committee on Interstate Commerce are set forth on page 5 of this pleading.

should have the discretion to restrict or not restrict Western Union to its domestic telegraph operations in accordance with the Commission's determination as to what would be in the public interest.

C. Since the language of the divestment provision is clear and unambiguous, additional concepts should not be read into that provision.

In view of the clear and unambiguous language of the divestment provision, it is especially inappropriate to read into that provision a much broader and more encompassing meaning than is suggested by the language of that provision. In such a case the clear language of the provision is the best guide to ascertaining the Congressional intent. Thus, in United States v. Great Northern Railway Co., 343 U.S. 562, 575 (1952), the Supreme Court stated: "It is our judicial function to apply statutes on the basis of what Congress has written not what Congress might have written." Similarly, in 62 Cases, etc. of Jam v. United States, 340 U.S. 593, 596 (1961), Mr. Justice Frankfurter, speaking for the Court, stated: "But our problem is to construe what Congress has written. After all, Congress expresses its purposes by words. It is for us to ascertain -- neither to add nor to subtract, neither to delete nor to distort."

Indeed, it is also inappropriate, in a case such as this, where the language of the relevant provisions of the statute are clear and unambiguous, to attempt to vary the meaning of such provisions by reference to legislative history. Thus,

in Montgomery Charter Service, Inc. v. Washington Metropolitan Area Transit Commission, 325 F. 2d 230, 232-233 (D.C. Cir. 1963), the court in rejecting the attempt of the Washington Metropolitan Area Transit Commission to interpret a statute differently than indicated by its unambiguous language, stated:

> [2] The Commission's brief flatly states, nevertheless, that "The language of Section 1(c) is ambiguous" and seeks to demonstrate from the legislative history of the Act that Congress did not intend Section 1(c) to mean what it plainly, unambiguously and unequivocally says. The Commission's statement that Section 1(c) is ambiguous is obviously inaccurate, as the plain terms of the section show. An inaccurate allegation of ambiguity does not justify the use of legislative history to vary the meaning of clear and unambiguous statutory language. We said in Elm Broadcasting Corp. v. United States:
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> > "* * * It is elementary in the law of statutory construction that, absent ambiguity or an absurd or unreasonable result, the literal language of a statute controls and resort to legislative history is not only unnecessary but improper. United States v. Missouri Pac. R. Co., 1929, 278 U.S. 269, 49 S.Ct. 133, 73 L. Ed. 322. [*]
> >
> > "[*] In that case the Supreme Court said, 278 U.S. at page 278, 49 S.Ct. at page 136:
> >
> > > "'* * * Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed [Cases cited.]"

See also Consolidated Flowers Shipments v. Civil Aeronautics Board, 205 F. 2d 449, 451 (9th Cir. 1953).

D. The divestment provision involves a restriction on the conduct of business and consequently should be narrowly construed.

A rule of strict construction is generally applied to the interpretation of statutes which impose restrictions on the conduct of business. The general rule is that the scope of such statutes is not to be extended beyond the usual meaning of the terms. 50 Am. Jur. Statutes, § 397. See also United States v. Masonite Corporation, 316 U.S. 265, 280 (1942), where the Court stated that "Since patents are privileges restrictive of a free economy, the rights which Congress has attached to them must be strictly construed so as not to derogate from the general law beyond the necessary requirement of the patent statute."

In a significant recent case, the Supreme Court very narrowly interpreted a Consent Decree, which restricted the activities of Armour & Co. In United States v. Armour & Co., 402 U.S. 673 (1971), the Court considered whether an acquisition of a meat packer by a company engaged in a business forbidden to the packer by the Meat Packers Consent Decree of 1920 violated that Decree. Under the 1920 Decree, Armour and several other defendants were required to abandon their interests in a wide variety of food and non-food lines. They were required to divest themselves of any interest in the business of "manufacturing, jobbing, selling,. . . distributing, or otherwise dealing

in" a long list of food and other products sold by grocery stores. They were enjoined from "either directly or indirectly, by themselves or through their officers, directors, agents, or servants, engaging in or carrying on, either by concert of action or otherwise" the prohibited activities. The defendants were further enjoined from "owning, either directly or indirectly, . . . any capital stock or other interest whatsoever" in any business which dealt in the prohibited products.

Despite the fact that Armour would have been unable to acquire Greyhound since Greyhound engaged in a business forbidden to Armour by the Consent Decree, the Court noted that the Consent Decree did not explicitly prohibit the specific relationship in issue and held that the acquisition of Armour by Greyhound did not violate the Decree's prohibition against Armour directly or indirectly engaging in or carrying on the forbidden business.

Accepted principles of statutory construction thus indicate that the divestment provision in Section 222 should not be expansively interpreted as the Bureau has done, but rather should be construed as written. Moreover, any interpretation of Section 222 which would preclude Western Union from providing any international telegraph operation irrespective of the public benefits that a particular service would provide would appear to be contrary to public policy. In this connection, we note that the Acting Assistant Attorney General in charge of the Antitrust Division in explaining the Justice Department's action in filing a motion in November 1971 to modify the 1920 Meat Packers Decree

so as to make it less restrictive stated, among other things, that it is "in line with the Division's current policy with respect to decrees of placing time limitations on prohibited conduct which, in and of itself, does not constitute an independent violation of the antitrust laws." Commerce Clearing House Trade Regulation Reporter, par. 45,070, pp. 53,201-2.

E. The Bureau's interpretation of the divestment provision as restricting the Commission's authority is at odds with the theory of allowing regulatory agencies flexibility to effectively deal with problems under constantly changing circumstances.

The Bureau's interpretation of the divestment provision as precluding the Commission from authorizing Western Union to provide any international telegraph operation, irrespective of whether such an authorization would be in the public interest, would result in an unwarranted limitation of the Commission's authority. Indeed, such a construction is at odds with the theory of allowing regulatory agencies flexibility to effectively deal with problems under constantly changing circumstances. Thus, for example, the Commission, quoting in part from F.C.C. v. RCA Communications, Inc. 346 U.S. 86 (1953), stated:

> "As an administrative agency, the Commission has been entrusted with the responsibility of weighing the divergent considerations before it because, in the language of the Supreme Court, it is '. . . better equipped . . . for weighing intangibles "by specialization, by insight gained through experience, and by more flexible procedure."'" (File No. P-C-3630, FCC 55-1128, Mimeo No. 24946)

Since Western Union, subsequent to the divestiture, could not provide any international telegraph operation without first seeking and receiving the necessary authority from the Commission, it would appear unreasonable to believe that Congress intended to preclude the Commission, as a matter of law, from ever again authorizing Western Union to provide any international telegraph service irrespective of any circumstances that might prevail in the future.

Indeed, in the present case, where the international record carriers are proposing to charge the public much higher rates for service similar to that for which Western Union has applied, refusal of the Commission to consider the merits of Western Union's application would appear to be an abdication of the Commission's responsibility under Section 1 of the Communications Act to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . ." In this connection, it is noted that in Phillips Petroleum Co. v. State of Wisconsin, 347 U.S. 672 (1954), the Supreme Court reversed the Federal Power Commission's determination that it did not have the authority to regulate gas sold for interstate transportation and resale despite the fact that the Federal Power Commission had consistently interpreted the Natural Gas Act as not conferring such jurisdiction. In doing so, the Supreme Court indicated that, among other things, the regulation of such activities by the Federal

Power Commission would help to carry out the primary aim of the Natural Gas Act to protect consumers against exploitation at the hands of natural gas companies. See also United States v. Southwestern Cable Company, 392 U.S. 157 (1968), where the Supreme Court discussed the broad authority of the Commission at 392 U.S. 167-168, 172-173 (1968), and noting that the Commission reasonably found that regulation over community antenna television systems was necessary for carrying out its responsibilities, upheld the Commission's assertion of jurisdiction over cable television even though the Commission had previously determined that it had no jurisdiction over the industry. Cf. Permian Basin Area Rate Cases, 390 U.S. 747, 780 (1968), where the Court stated that "We are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes."

F. The Bureau's heavy reliance on the Commission's decision in Telegraph Service With Hawaii is not warranted.

In Telegraph Service With Hawaii, 28 FCC 599 (1960), the question before the Commission was not whether Western Union could legally provide international telegraph service. Rather, the question was, in view of Hawaii's recent admission as a State, whether service to Hawaii should now be considered a domestic telegraph operation. Western Union had not completely divested itself of its international telegraph operations at that time.

It did not argue in that case -- as it does in the instant case -- that Section 222 would not preclude it from providing a telegraph service to Hawaii if such service were considered to be an international telegraph service and in the public interest.

While admittedly the Commission in the Hawaii case made several statements pertaining to its interpretation of the scope of Section 222 which are unfavorable to our position, it should be noted that the Commission did not have in that case the benefit of arguments dealing specifically with that issue. The present case, to the best of our knowledge, is the first case where arguments have been focused on the issue of whether Section 222 eternally precludes the Commission from authorizing Western Union to provide any international telegraph service even if such a service would provide substantial public benefits. We further note that unlike the circumstances existing at the time of the Hawaii case, the divestment provision has now been completely executed. Consequently, for the reasons advanced in this pleading, the divestment provision no longer has any all pervasive and eternal effect. To the extent that statements in the Hawaii case may be deemed inconsistent with our position that Western Union is not precluded by Section 222 from providing its proposed Hawaii Mailgram service, we respectfully request that the Commission modify such statements.

IV.

EVEN ASSUMING, ARGUENDO, THAT SECTION 222 PRECLUDES WESTERN UNION FROM PROVIDING THE TYPES OF INTERNATIONAL TELEGRAPH OPERATIONS CARRIED ON AT THE TIME THE SECTION WAS ENACTED, IT CERTAINLY CANNOT VALIDLY BE INTERPRETED AS PRECLUDING WESTERN UNION FROM PROVIDING NEW INTERNATIONAL TELEGRAPH SERVICES SUCH AS AN INTERNATIONAL MAILGRAM SERVICE

A. "Theretofore carried on".

The divestment provision provides that Western Union divest itself of its international telegraph operations "theretofore carried on". The only meaning shown for "theretofore" in the 1966 unabridged edition of The Random House Dictionary is "before or until that time". Consequently, irrespective of how broadly the divestment provision is interpreted, it cannot validly be interpreted as precluding new types of international telegraph operations which Western Union did not provide at the time Section 222 was enacted. To do otherwise would violate the cardinal rule of statutory interpretation that every word should have a significance.

Thus, the Supreme Court in Ex parte Public National Bank, 278 U.S. 101, 104 (1928), stated that "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word.'" For the same general proposition, see also D. Ginsberg & Son v. Popkin, 285 U.S. 204, 208 (1932); McDonald v. Thompson, 305 U.S. 263 (1938); and Consolidated Flowers Shipments v. Civil Aeronautics Board, 205 F. 2d 449, 450 (9th Cir. 1953).

B. Mailgram service is a new telegraph service.

Mailgram service is a new innovative service provided by Western Union under joint arrangements with the United States Postal Service. That it is a new service is further supported by the action of the Common Carrier Bureau in rejecting a tariff submitted by RCA Globcom for a service similar to Mailgram. In rejecting the tariff, the Bureau in a letter dated May 3, 1972, indicated that such a service was not of the type provided by RCA Globcom in 1964 even though RCA Globcom provided a number of different telegraph operations at that time. Indeed, the Bureau went so far as to state that such a service was not even of the type included in a 1964 authorization to RCA Globcom to provide a number of specified telegraph services and "any other record service". Manifestly, Mailgram service is not the type of operation "theretofore carried on" in 1943, and, consequently, even under an expansive interpretation of Section 222, that section cannot properly be construed as precluding the provision of an international Mailgram service by Western Union.

WHEREFORE, Western Union respectfully requests that the Commission review and reverse the Bureau's interpretation

of Section 222 and direct the Bureau to accept its Hawaii Mailgram application for consideration on its merits.

Respectfully submitted,

THE WESTERN UNION TELEGRAPH COMPANY

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May 19, 1972

Its Attorneys

CERTIFICATE OF SERVICE

I, Winnie A. Jefferson, hereby certify that I have this 19th day of May, 1972, sent by first class United States mail, postage prepaid, a copy of the foregoing "Application for Review of Action Taken Pursuant to Delegated Authority" to the following:

Mr. Bernard Strassburg
Chief, Common Carrier Bureau
Federal Communications Commission
Washington, D. C. 20554
(Hand Delivery)

Mr. Abbott C. Roseman
Chief, International & Satellite
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Winnie A. Jefferson

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and to operate facilities to extend Mailgram service between the United States Mainland and Hawaii.	File No.

OPPOSITION TO
APPLICATION FOR REVIEW OF ACTION
TAKEN PURSUANT TO DELEGATED AUTHORITY

RCA Global Communications, Inc. ("RCA Globcom") hereby opposes the application filed pursuant to Section 1.115 of the Commission's Rules by The Western Union Telegraph Company ("Western Union") requesting review of the Chief of the Common Carrier Bureau's action in returning Western Union's application for authority to extend its Mailgram service from the United States Mainland to Hawaii.

On April 28, 1972 Western Union filed an application for authority under Section 214 of the Communications Act to lease and operate facilities between the 48 contiguous United States and the

State of Hawaii for the purpose of extending Western Union's domestic Mailgram service to Hawaii.

On May 19, 1972 the Chief of the Common Carrier Bureau returned the Western Union application on the grounds that:

(a) Mailgram is an international telegraph service;

(b) Section 222 is intended to preclude Western Union from providing past and future international telegraph services in competition with the independent international telegraph carriers; and

(c) The Commission has no authority to grant the Mailgram application, absent an amendment of Section 222 of the Communications Act, even if it were considered in the Public interest.

In its instant petition Western Union argues that Section 222 of the Communications Act does not preclude a grant of Section 214 authorization to it to provide all types of international telegraph services since there is no specific prohibition against engaging in international telegraph operations in the future. It states the Common Carrier Bureau has completely misconstrued the relevant portion of the legislative history of Section 222 in reaching his conclusion that Western Union is precluded from engaging in any future telegraph operations. Western Union contends that since the divestment provision of Section 222 constitutes a restriction on the conduct of its business,

the section should be construed narrowly and in favor of allowing the grant of Section 214 authority. It also contends that the Bureau's refusal to grant authority is at odds with the theory of allowing regulatory agencies flexibility to effectively deal with problems under constantly changing circumstances. Finally, Western Union argues that even if it were barred from providing the same types of telegraph services it provided at the time of the divestment, Mailgram is not a service "theretofore carried on" but instead is a totally new telegraph service.

The basic issue presented in the Western Union application for review is whether the Common Carrier Bureau has correctly interpreted Section 222 of the Communications Act as precluding Western Union from providing international Mailgram service.

As shown below, we believe that Section 222 is an absolute and continuing bar to the acquisition by Western Union of any international telegraph operations. Thus the Chief of the Common Carrier Bureau was correct in his interpretation of the legislative history of Section 222 and drew the appropriate conclusions therefrom. It is also apparent that Western Union's attempt to have the Commission narrowly interpret Section 222 is without any support. The few cases it does cite are not applicable to the present factual situation. Likewise Western Union's contention that interpreting Section 222

as providing a continuing prohibition is at odds with the theory of allowing regulatory agencies flexibility is fatuous. No such principle exists which can be applied in all circumstances. The Chief of the Common Carrier Bureau was also correct in relying on the Telegraph Service with Hawaii case. That case as well as other past Commission decisions clearly establish the absolute nature of Section 222. Lastly, we believe Mailgram is clearly a telegraph service and within the ambit of Section 222.

Therefore we submit that the Chief of the Common Carrier Bureau was correct in his interpretation that Western Union is barred indefinitely from providing all international telegraph services including Mailgram. In support of this opposition RCA Globcom submits the following information:

1. Section 222(c)(2) of the Communications Act, the divestment provision, reads:

> Any proposed consolidation or merger of domestic carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger.

The divestment requirement is absolute, and clearly states that all international telegraph operations of the domestic carrier would have to be divested. It is obviously a gambit for Western Union to argue that the divestment provision was not meant to be

a permanent bar to international telegraph operations. Even assuming the language of Section 222 is not clear, it would be permissible and, in fact, mandatory to consider the genesis of the provision in question as the Chief of the Common Carrier has done in his letter returning the Western Union application.

2. It is well settled in the law that statutory construction must not occur in a vacuum. In a 1968 case the Court stated "statutes are contextual as well textual. Their proper interpretation requires more than linguistic seriation. Courts must also look to the logic of Congress and to the broad, national policy which prompted the legislation."* It is hornbook law that before the true meaning of a statute can be determined, consideration must be given to the problem to which the legislature addressed itself, the legislative history of the statute and the administration of the statute prior to the instant litigation.**

3. During the period prior to enactment of Section 222 in 1943 the Postal Telegraph Company suffered seriously from competition within the industry and with forms of communication other than tele-

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* Argosy Limited v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968).

** 2 Sutherland, Statutory Construction 4505 (3rd. ed. Horack 1943).

graph. Postal had been incurring large losses and had already been advanced about $9,000,000 from the Reconstruction Finance Corporation to allow its continued operation. Western Union had supported consolidation of the domestic telegraph carriers on the grounds that "There is no more reason for three telegraph services than for three telephone services. Such duplication is wasteful. It should be discouraged."* It was barred from seeking and attaining merger, however, by the effect of the antitrust laws.

4. Thus the enactment of Section 222 on March 6, 1943 was for the special purpose of dealing with the unusual and pressing circumstances surrounding the impending failure of the Postal Telegraph Company and to provide an affirmative grant of authority supplanting the antitrust laws which stood in the way of such consolidations and mergers.**

5. The merger bill was the outgrowth of legislative studies that had been conducted since 1939 when the Senate adopted a resolution directing a study of the telegraph industry in the United States. In the course of these studies, hearings were held

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* Hearings on S.2598 Before a Senate Subcommittee of the Committee on Interstate Commerce 77th Cong. 2nd Sess. 63 (1942).

** H.R.Rep. No. 69, 78th Cong., 1st Sess., 1 (1943).

in May 1941* at which spokesmen for the industry and the Commission emphasized the need for a requirement that a merged domestic carrier divest itself of its international operations.

Federal Communications Commission Chairman James Lawrence Fly testified:

> Also, Western Union (as the merged domestic carrier) would have to divest itself of its international cable lines and business in order to avoid any undue preferential treatment which might otherwise result.**

6. Concern was voiced by regulatory as well as industry spokesmen that Western Union, through ownership of the single remaining nationwide telegraph system, would be in a position to control the distribution of outbound international telegraph traffic and to favor its own international cable facilities. Accordingly, Section 222(e) directs that any consolidated or merged carrier shall distribute among the international carriers telegraph traffic destined to points outside the continental United States and divide the charges

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* Hearings on S. Res. 95 Before a Senate Subcommittee, 77th Cong., 1st Sess. (extended by S. Res. 268, 77th Cong., May 19-29, 1941).

** Id. at 16.

for such traffic in accordance with such joint, reasonable, and equitable formula as the carriers shall agree upon and the Commission shall approve. It appears that the danger presented by possible favoritism in traffic distribution seemed to the framers of the legislation to require more protective measures than the formula alone, since divestment was required of Western Union, despite the formula provision.

7. Western Union would have the Commission, however, disregard the clear Congressional intention to restrict Western Union to domestic telegraph business by arguing that Congress would have included a specific proviso as to the duration of the prohibition against entering the international market if it had so intended. Rather than militating in favor of Western Union, we submit that the absence of any specific proviso indicates the clear intention that the prohibition continue at least as long as Western Union's monopoly in the domestic telegraph business. If one accepts the Western Union position, then it could have reentered the international telegraph business one day after it had completed divestment. Certainly, interpreting the statute in this manner leads to an absurd and unreasonable result. See page 13 of Western Union's petition and the case cited thereon for the appropriate rule of statutory construction in such a situation.

8. In support of its position on the absence of a specific proviso as to the duration of the prohibition, Western Union cites several cases in which a company is not precluded from again engaging in the particular activity which it was required previously to divest unless such a prohibition is specifically included in the order. The distinction between such court cases and a statute enacted by Congress involving a specific legislative history should be evident. In each of the cases cited by Western Union the factual situation involves a divestment under one of the antitrust laws where the company ordered to divest received nothing in return.

9. Western Union also contends that the Chief of the Common Carrier Bureau "completely misconstrues what it appears to consider to be the relevant portion of the legislative history" by noting that the Senate Committee on Interstate Commerce recommended Congress adopt an amendment to the Communications Act which would "empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations <u>if found to be in the public interest</u>..." Western Union argues that the underlined portion of the recommendation indicates the Commission was to retain a discretionary power to allow future international telegraph service if it found the service to be in the public interest.

10. We submit the opposite is true and that the Chief of the Common Carrier Bureau was correct in his interpretation. The amendment recommended by the Senate Committee was not accepted but instead the divestment provision was enacted without the discretionary clause. Thus Congress chose to enact a stronger and unqualified divestment provision; that the Congress "shall require" the merged domestic carrier to divest itself "as promptly as it reasonably can."

11. Further, the absence of the discretionary clause is extremely significant when viewed with the other provisions of Section 222. Thus when Congress chose to qualify the Commission's action in Section 222 it very clearly did so. For example, the merger and distribution clauses very precisely delimit the Commission's discretion. We must therefore conclude that Congress, cognizant of the recommendation by the Senate Committee, chose not to give discretion to the Commission in this area but to require absolute and final divestment.

12. Western Union also contends that the divestment provision should be interpreted narrowly because it involves a restriction on the conduct of business. In support of this proposition it cites first a case involving a patent privilege and second a recent Supreme Court case which it states stands for the same proposition. The patent case cited by Western Union* did involve a situation where

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*United States v. Masonite Corporation, 316 U.S. 265 (1942)

the Court felt the patent should be interpreted narrowly. Western Union fails, however, to detail the facts which lead to this conclusion. The Court was dealing with a situation in which the defendant corporation was using a patent privilege to escape the more general prohibition against restraint of trade. The Court stated:

> That must be the point of departure for decision on the facts of cases such as the present one lest the limited patent privilege be enlarged by private agreements so as to by-pass the Sherman Act. Certainly, if the de credere agency device were given broad approval, whole industries could be knit together so as to regulate prices and suppress competition. That would allow the patent owner under the guide of his patent monopoly not merely to secure a reward for his invention but to secure protection from competition which the patent law unaided by restricted agreements does not afford.*

This can hardly be cited for any precedent value in the instant situation. There is no necessity for the Commission to unduly restrict its interpretation of the divestment provision.

13. The second case cited by Western Union in favor of a narrow construction of the divestment provision is United States v. Armour & Co., 402 U.S. 673(1971). That case involved the very precise question of the interpretation to be given a consent decree. The court recognized that consent decrees are entered into after negotiation

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*Id. at 278-279.

between the plaintiff and defendant and as such necessarily involve a compromise, i.e. the parties give up something they might have won in a formal evidentiary proceeding in order to save the time, expense and inevitable risk of litigation.

> For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.*

Again, as in the prior case, Western Union has used principles of interpretation developed in particular and unusual situations as indicating general rules of statutory construction that should be applicable in all situations.

14. While the rule of statutory construction applicable to consent decrees may dictate a narrow interpretation, the very specific principle pronounced by the Court in the Armour Case has no significance in the instant situation where Western Union has voluntarily subjected itself to the divestment provision in order to acquire a domestic telegraph monopoly.

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*United States v. Armour & Co. 402 U.S. 673, 682 (1971).

15. Western Union is also incorrect in contending that the Common Carrier Bureau interpretation of Section 222 must be rejected for being at odds with the theory of allowing regulatory agencies flexibility to effectively deal with problems under constantly changing circumstances. We know of no universal principle that regulatory commissions possess unlimited authority, and Western Union cites no case in support. One case it does cite merely demonstrates that in those situations where the statute with which the regulatory agency works was written before specific types of problems were extant, then in certain cases the broad general purposes of the governing statute must be considered. Thus in United States v. Southwestern Cable Company, 392 U.S. 157 (1968), the Court was concerned with whether the Commission had authority to regulate CATV systems, a form of communications not even in existence at the time the Communications Act was enacted. The Permian Basin Area Rate Cases, 390 U.S. 747 (1968) on the other hand dealt with the extent of a regulatory agency's authority to set rates. The basic authority to set rates for individual companies was acknowledged, but the extension to cover broad geographic areas was in question.

16. The above cases cannot be compared with the instant situation. The divestment provision has a clear legislative history and has been consistently applied. The only principle that the

Commission could set by accepting Western Union arguments and allowing the provision of Mailgram to Hawaii is that the basic statute which governs the Commission can be interpreted without regard to its intended purpose. In this regard it is interesting to note that in a case cited by Western Union in support of its argument that the Commission should interpret the divestment provision broadly so as to retain flexibility, the Supreme Court based its decision on the fact that the Federal Power Commission had failed to properly interpret the relevant statutory language, the pertinent legislative history, and past court decisions.*

17. The principle advocated in the instant case by Western Union is also strangely at odds with the position it took on a Commission rulemaking proceeding in Docket 18703 which was concerned with, among other things, the authority of the Commission to reject tariff filings that did not comply with proposed informational rules. The Commission had based its authority to issue the rejection rule on the general "catch-all" provision of Section 4(i) of the Communications Act which permits the Commission to "perform any and all acts,

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* Phillips Petroleum Co. v. State of Wisconsin, 347 U.S. 672, 677 (1954)

make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

18. Western Union challenged the Commissions authority by stating:

> At present, the Commission under Section 203(d) of the Act, can reject a tariff filing, solely for the reason that it does not provide and give lawful notice of its effective date. Obviously, this present rejection authority is the expressed limit enacted by Congress. Therefore, change, as broad as contemplated in this proposed section, should be enacted by Congress.

It appears the "principle" of wide Commission discretion is only to be advocated when the Communications Act prohibits your desired end and will be rejected if necessary in a specific situation where a narrow interpretation is desired.

19. Western Union's attempt to distinguish the Telegraph Service with Hawaii Case* is likewise without merit. Western Union tries to dismiss the necessary conclusion of the Commission that the domestic telegraph carrier must withdraw from telegraph services to overseas points by stating:

> It did not argue in that case -- as it does in the instant case -- that Section 222 would not preclude it from providing a telegraph

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* Telegraph Service With Hawaii 28 F.C.C. 599 (1960)

> service to Hawaii if such service were considered to be an international telegraph service in the public interest.

20. It is obvious that Western Union did not make the argument in the Hawaii Case because it accepted that it was required by Section 222(c)(2) to withdraw from the international telegraph market. The Commission could not have stated its position more clearly than that Section 222 "was included to limit the operations of the merged carrier to its historic area of landline service, and to preclude it from competing for traffic to overseas areas, including Hawaii."*

21. Further the Commission's conclusion in this regard is not mere dicta as Western Union seems to suggest but a vital part of the reasoning process that was used to determine whether an amendment to Section 222 was required to allow Western Union to maintain telegraph services to Hawaii. Even Western Union recognizes the weakness of its argument with respect to the Hawaii Case by requesting the Commission to modify its statements in that case to the extent they are inconsistent with its position taken in the petition for review.

22. In this regard it should be noted that in treating Western Union's arguments that public interest considerations (i.e. lower rates, faster service) necessitate granting it authority to

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* Id. at 607

service Hawaii,* the only option the Commission considered was whether it should recommend legislation to Congress to change Section 222. It completely disregarded the notion that it has discretion to modify the Congressional intent embodied in the statute.

23. It should also be noted that during the long history of extensions and delays in the Western Union Divestment proceedings from the initial order to divest in September 1943 the Commission has had ample opportunity to observe the activities of the as yet undivested merged domestic carrier and remarked:

> "Assuming the best of faith on its part in its interpretation of the formula, Western Union cannot be regarded as an impersonal forwarder in the present conditions of conflicting interests. We think that it is manifest, from our extensive findings in this connection, that continued operation of the cables by Western Union gives rise to serious problems in the distribution of international telegraph traffic, and that such problems cannot be alleviated other than by divestment. Thus, the reasons which impelled Congress to require divestment of Western Union's [international] telegraph operations have been amply justified by experience under a combined landline-cable operation."**

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* Telegraph Service with Hawaii at 609

** Western Union Divestment 25 F.C.C. 35, 87 (1958).

Thus, for almost twenty years the Commission consistently applied the same interpretation of Section 222: that complete divestment was required.

24. As an alternative to its arguments already discussed Western Union states that the proposed Mailgram service is not "telegraph service" as that term is used in Section 222 but an altogether new service. Mailgram service clearly and simply is the telegraphic transmission of messages to distant teleprinters, utilizing postmen instead of company messengers for delivery to the addressee. But this difference is hardly so revolutionary as to make Mailgram into a service apart from telegraph. Nor is mail delivery revolutionary. The international carriers have for years been providing the option of having international telegraph messages delivered by mail if the customer so desires. Thus for at least 30 years RCA Globcom had an effective tariff provision allowing the selection of regular post as the medium for delivery of telegrams. Therefore, we agree with the recent findings of the Chief of the Common Carrier Bureau and the Commission's earlier statement that "to elevate this experimental amalgam of two traditional services to the level of a 'radical departure' from existing telegraph services is stretching the facts."*

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*See Federal Communications Commission's brief on petition for review of Memorandum Opinion and Order of the Federal Communications Commission (A.72-72) dated January 2, 1970 at 20.

25. Inasmuch as Mailgram is a telegraph service, there is no force to the Western Union argument that the "theretofore carried on" clause of the divestment provision permits it to now provide Mailgram.

26. In conclusion, RCA Globcom believes that the action of the Chief of the Common Carrier Bureau in returning the Western Union Mailgram application was correct. Review of that action is unwarranted since Western Union has not shown:

> (a) the action taken pursuant to delegated authority was in any way in conflict with statute, regulation, case precedent, or established Commission policy,
>
> (b) the present issues involves a matter of law or policy which has not been previously decided by the Commission,
>
> (c) the action involved application of a precedent or policy which should be overturned or revised,
>
> (d) there was an erroneous finding as to an important or material factor, or
>
> (e) there was prejudicial procedural error.

WHEREFORE, in view of the foregoing, RCA Globcom opposes the petition for review filed by Western Union and requests the Commission to deny it. If the Commission does decide to entertain the petition,

RCA Globcom requests the opportunity to file briefs and engage in oral argument before the Commission on this most important matter.

Respectfully submitted,

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June 26, 1972

CERTIFICATE OF SERVICE

I, Sonja C. Owen, hereby certify that I have this 26th day of June, 1972, mailed, postage prepaid, a copy of the "Opposition to Application for Review of Action Taken Pursuant to Delegated Authority" to the following:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)
	)
THE WESTERN UNION TELEGRAPH COMPANY	)
	)
Application For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Lease and to Operate Facilities to Extend Mailgram Service Between the United States Mainland and Hawaii.	)

PETITION OF WESTERN UNION INTERNATIONAL, INC.
TO DISMISS OR DENY APPLICATION FOR REVIEW

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June 26, 1972

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PETITION OF WESTERN UNION INTERNATIONAL, INC.
TO DISMISS OR DENY APPLICATION FOR REVIEW

By application filed April 4, 1972, The Western Union Telegraph Company (WUTelCo) requested authority, pursuant to Section 214 of the Communications Act of 1934, as amended (the Act), to provide Mailgram service between the mainland United States and the State of Hawaii.

The Common Carrier Bureau, by letter decision dated April 19, 1972 (Decision), rejected the application upon the ground that, pursuant to Section 222 of the Act, the Commission lacked authority to consider the application.

On May 19, 1972 WUTelCo filed an Application for Review of the Decision. Western Union International, Inc. (WUI) hereby petitions the Commission to dismiss or deny the Application for Review and supports the Decision.

I. Summary of Argument

1. The issue presented is whether Section 222 of the Act excludes WUTelCo from international telegraph operations. It took twenty years for WUTelCo to effectuate the Congressional mandate of cessation of international operations, notwithstanding repeated Commission and judicial admonitions. Now, only eight years after implementation of the mandate, WUTelCo seeks to evade that mandate and to re-enter international operations. WUTelCo's present position that this divestment requirement was a momentary, evanescent event and that WUTelCo could re-enter the international market place at any time thereafter, flies directly in the face of:

(a) Section 222 of the Act, as supported by its legislative history;

(b) judicial constructions of the statute;

(c) the Commission's prior determinations and rulings; and

(d) WUTelCo's own prior position.

2. Moreover, WUTelCo asks the Commission to reverse the legal conclusion of its Common Carrier Bureau, whose senior officials actually witnessed and participated in the regulatory history of the divestment and are experts in its legislative history.

3. Absolutely as a matter of law, WUTelCo cannot provide international record services.[1] Both the wording of the statute and its legislative history support

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1. Manifestly as a matter of policy the Commission should not authorize an international re-entry by WUTelCo even if the Commission had power to do so, which it clearly does not by virtue of Section 222.

the Bureau's conclusions regarding WUTelCo's proposed mailgram service to Hawaii:

> "a. The proposed service is an international telegraph service;
>
> b. Section 222 is intended to preclude WUTC from providing future international telegraph services, as well as those provided in 1943, in competition with the independent international telegraph carriers; and
>
> c. The Commission, therefore, has no authority to grant the instant application, even if it were considered in the public interest, absent an amendment of Section 222 of the Communications Act." Decision, p. 5.

4. Although the issue before the Commission is simple and the legal ruling by the Common Carrier Bureau is obviously correct, WUI is briefing this issue at length in this petition because of its fundamental and pervasive significance to WUI. The very birthright of WUI, which purchased the international telegraph operations from WUTelCo, is being challenged by the seller which covenanted at the time of the sale that "it will not compete, either directly or indirectly, by wire, radio or other means of communication, now or hereafter existing, with the Cable System in international telegraph operations." The full text of this covenant and its origin and background before the Commission is set forth in the letter regarding mailgram service of April 11, 1972 from WUI's President to the Chairman of the Commission, which letter is incorporated herein by reference.

5. Nearly 30 years have passed since Congress bestowed upon WUTelCo the valuable privilege of merger with Postal Telegraph Co. As a condition of permitting by statute the creation of a domestic telegraph monopoly which otherwise would have been barred by the antitrust laws, Congress ordered total divorce of WUTelCo from international operations because (among other reasons) as the sole purveyor of domestic services, its built-in advantages as a participant in international operations would be unfair.

6. The merger legislation was permissive. Nevertheless, WUTelCo chose to consummate the merger, thereby accepting and activating the statutory limitation precluding international operations. Having enjoyed the fruits of the legislative bounty, WUTelCo is now trying to evade the reciprocal statutory restriction. Similarly, having received a valuable consideration from WUI for the sale of the international operations, WUTelCo now seeks to resume international operations and to violate its covenant not to compete.

7. In the three decades since promulgation of Section 222, Government and industry have functioned in universal agreement that, following divestment of its theretofore provided international services, WUTelCo

would not conduct international operations of any kind. It is clear that Congress's objectives would not have been attained if, following divestment, WUTelCo were to be permitted to re-enter the international sphere and once again be in a position to favor its international arm by virtue of its domestic telegraph monopoly and be able to form a huge domestic-international combine.

8. Both the Commission and the courts have agreed with this reading of Section 222. WUTelCo has itself recognized its statutory inhibition from participating in international operations. Congress, which has had three decades to evaluate the results of its handiwork, together with the judicial and administrative interpretations of its legislation, has found no reason to alter the statute.

9. Accordingly, the Bureau astutely rejected WUTelCo's application of April 4, 1972 to provide international mailgram service between the Mainland and Hawaii. In its application for review, WUTelCo has presented no pertinent new arguments not already raised in its Section 214 application and rejected by the Bureau. Since WUTelCo has merely added irrelevant citations to unrelated fields of law, absolutely no basis has been presented for the Commission to reverse the Bureau's ruling.

II. Section 222 Excludes WUTelCo From Any International Operations

10. Section 222 bars WUTelCo from international operations. Following a careful definition of domestic and international telegraph operations solely on the basis of a geographical delineation, with no chronological limitations (Section 222(a)(5) and 222(a)(6)), the statute permitted the merger of the two domestic carriers (Section 222(b)(1)) and mandated divestment of their international operations (Section 222(c)(2)). This geographical dichotomy between "domestic" and "international" operations, set forth in Section 222, is dispositive of the issue before the Commission.[2]

11. Section 222 also permitted either as part of the domestic merger "or thereafter" the further acquisition by the "merged carrier" of "domestic telegraph properties, facilities or operations" from either a "carrier... not primarily a telegraph carrier", or an "international telegraph carrier". Sections 222(b)(1), (2). It is important to note that this careful delineation of the operating scope of the domestic carrier--both as a result of the initial merger and any subsequent acquisitions--is limited to the domestic sphere.[3]

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2. Unless or until the North American continental land mass displaces the Atlantic, Pacific, or Caribbean bodies of water, WUTelCo is barred from providing record communications services between the continental United States and overseas points. This is the answer to WUTelCo's question of whether "Congress had intended to preclude Western Union eternally from providing an international telegraph service." Application for Review, pp. 3 - 4.
3. WUTelCo has since taken advantage of Section 222(b)(1) to

12. Not only is WUTelCo barred from consolidating with an international carrier, but Section 222 (c)(2) requires that even those international telegraph operations theretofore carried on by any party to a consolidation of domestic telegraph carriers must be divested. Accordingly, following any acquisitions permitted in this section, the merged domestic carrier is to be totally--not temporarily--divorced from international telegraph operations.

13. This structure also underlies Section 222(e), which mandates an international formula in the case of any consolidation permited under Section 222. Although the Act recognizes that there must be a gap in time between the domestic merger and actual divestment of WUTelCo's international operations, this provision sets out the principle of the merged carrier's structural separation from international operations immediately upon merger. The merged carrier must make its traffic distribution pursuant to formula among the international telegraph carriers. Thereupon, "the international telegraph operations of any domestic telegraph carrier shall be considered to be the operations of an independent international carrier". Section 222(e)(4). .s these international operations were subject to divestment, the Act clearly in no way contemplates or permits further,

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acquire the TWX service from AT&T. See, Western Union Telegraph Co., 24 F.C.C. 2d 664 (1970).

other or different involvement internationally by the merged carrier, after divestment had been effected.

14. Thus, Section 222 permits the domestic merger; permits future expansion of the merged carrier's domestic operations; even under arrangements with international carriers; forbids future expansion into the international sphere; and sets out a requirement for the merged domestic carrier to provide equitable distribution of internatinal traffic pending divestment. By this careful circumscription of the merged carrier's functions, Congress intended to protect the public from the obvious detrimental consequences of both authorizing a domestic merger and permitting the merged domestic carrier to operate in the international field:

> "[B]y this legislation Congress relaxes a long-established and popularly supported policy against monopolies to the extent of permitting domestic telegraph companies to merge, but was careful to hedge this permission about with protective provisions clearly stated in the act...". Applications for Merger of Weste[illegible] Union and Postal Telegraph, 10 F.C.C. 148, 172 (1944).

III. The Legislative History of Section 222 Requires Total Separation of WUTelCo From Any International Operations

15. The legislative history of Section 222 clearly shows the intention to limit WUTelCo strictly to domestic telegraph operations. Since an act of Congress was necessary to confer the right of merger which would otherwise contravene the antitrust laws, there was a great deal of concern that a merged domestic carrier would have too great a concentration of power and would foreclose competition in the international sphere.

16. One of the prime objections to the merger bill was that it would tendto create "the formation of a huge, over-all single telegraph-cable-radiotelegraph combine" S. Rep. No. 13, 78th Cong., 1st Sess. 3 (1943).[4] The purpose of restricting carrier mergers or consolidations to domestic operations was to prevent such a concentration of power and resources. Id. Similarly, the divestment requirement was intended to ensure that the "merged domestic carrier would not be put in a position to compete unfairly with other international carriers by giving preference to its own international lines." 89 Cong. Rec. 1125 (daily ed. Feb. 18, 1943)(remarks of Sen. McFarland).

17. Although the Senate bill was initially modified by the House through deletion of the divestment requirement, H. R. Rep. No. 69, 78th Cong. 1st Sess. 2 (1943), there is no legislative history showing this was intended

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4. Cited hereinafter as S. Rep. No. 13.

as an implicit sanction of a vast domestic-international combine. Rather, the House considered that:

> "divestment would be desirable in the public interest, but in view of the certain existing long term contracts it was felt impracticable to require such action to be taken at this time." H. R. Rep. No. 142, 78th Cong. 1st Sess. 11 (1943).

18. The problem was resolved in conference and the divestment provision reinstated upon the House conferees determining that divestment would create no "undue hardship on the companies involved." Id.

19. The Senate bill which was introduced in 1943 was identical in all material respects with a bill passed by the Senate in 1942, but which failed in the House for lack of a quorum. S. Rep. No. 13, p. 1. In the 1942 hearings on the bill,[5] it was clearly understood that the merger restrictions and divestment provision were intended to limit the merged company by statute to domestic operations.

20. James L. Fly, then Commission Chairman, testified concerning the meaning of the provision prohibiting a domestic carrier from consolidation or merger with an international carrier:

> "I think that proviso ought to be there in any case; that is, we do not want the domestic company to have any international arrangements; that is, any international properties or operations. There are so many difficulties there that

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5. Hearings on S. 2598 Before a Subcomm. of the House Comm. on Interstate Commerce, 77 Cong. 2d Sess. (1942), cited hereinafter as Hearings.

> we do not think it is wise to have a tie-in...I think that they ought to be severed from any international operations, and leave those operations to entire separate and independent companies." Hearings, p. 16.

21. The then Commissioner Clifford J. Durr unequivocally stated the intended scope of the merger statute:

> "I think there is no substantial disagreement anywhere on the proposition that the domestic combination should get out of the international business.
>
> "On the merits, it is clear that this is an essential requirement. Not only do the economic and practical factors indicate the advisability of a clean separation between the domestic and international sides of the communications field but the problem of distributing traffic to the international carriers by the domestic monopoly is infinitely more complicated so long as that domestic monopoly competes for international business with an ununified international industry." Hearings, p. 180.

22. The legislative history of Section 222 underscores the intention to separate WUTelCo from all international operations. It provides absolutely no support for WUTelCo's remarkable contention that once divestment took place WUTelCo was free to return with impunity to the international arena.

IV. Judicial Interpretations of Section 222 Require Exclusion of WUTelCo From Any International Operations

23. The courts which have had occasion to review questions arising from implementation of the merger legislation have indicated that the statute provides a prospective bar to international operations by WUTelCo.

24. In Docket No. 9292, the Commission rejected, as violative of Section 222 and the International Formula, WUTelCo's contention that its still undivested Cable Division was free to expand its areas of operation to overseas points which the latter had not previously served and for which it had no Formula quota.[6] The Commission was upheld by the United States Court of Appeals. Western Union Telegraph Company v. United States, 217 F. 2d 579 (2nd Cir. 1954).

25. In that case, WUTelCo made the same argument that it makes now: that the merger legislation intended only to affect conditions that existed at the time of enactment and left international operations "open for all other

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6. FCC 53-591, May 18, 1953

comers into new areas where they were not interested in 1942." 217 F. 2d at 582. The court indicated that the Formula must be construed "in light of the statutory provision which was its authorization," and accordingly, found it "ridiculous to suppose" that the Congressional intention was "strict surveillance of contemporary competition without also intending to limit the dangers of Western Union Cables expansion in the future." Id.

26. The court rejected the WUTelCo argument that the restrictions on international operations only affected the landlines division of the company and that the activity of the international division, Western Union Cables, was not governed by the statute. This position was termed "ingenious but unpersuasive"; the court adding that such a view would in effect:

> "Permit Western Union effectively to escape all of the contemplated regulation; in all operating realities, Western Union Telegraph Company encompasses the activities of Western Union Cables, which in legal effect is but the name given to Western Union's international operations. The international and the domestic components of the company filed one consolidated tariff with the Commission. Profits from the contracts in question were considered revenue of the company as a whole." 217 F. 2d at 582.

27. Thus, no amount of corporate sleight-of-hand could be permitted to evade the prohibition against WUTelCo entering into new and different international operations other than those specifically subject to the Formula, and which were soon to be divested.

28. In a subsequent case, the same United States Court of Appeals reversed a Commission order requiring submission of a divestment plan by a specified date. Western Union Telegraph Company v. United States, 267 F. 2d, 715 (2nd Cir. 1959). The court found that the Commission had not abided by the statutory standards mandated by Congress and required a remand despite the recognized need for expedition in effecting the equally important "Congressional desire to divest completely Western Union's virtual landline monopoly, following the merger, from all finanacial interests in international telegraph operations." 267 F. 2d at 715.

29. These judicial decisions fully support the application of Section 222 to bar WUTelCo participation in international operations, beyond the technical requirement of divestment.

V. Commission Interpretations of Section 222 Require Total Separation of WUTelCo From Any International Operations

30. The Commission has had ample opportunity to rule upon the scope of Section 222. The Commission has consistently found that this section is an absolute bar to WUTelCo operations in the international sphere.

31. In the 1958 Western Union Telegraph Co. divestment case, the Commission characterized a WUTelCo position as follows:

> "Western Union insists that as part of its consideration for divestment, i.e., retiring entirely from international carrier operations, it should become the exclusive agent for the pick-up and delivery of international traffic originating or terminating in the gateway cities" 25 F.C.C. 35, 56 (emphasis supplied).

In reviewing the legislative history of the section, the Commission referred to the divestment provision as "a solution for the desirable policy of limiting a merged domestic carrier to domestic telegraph operations." 25 F.C.C. at 74.

32. In the 1961 Western Union Divestment decision, the Commission rejected a portion of the plan which provided for the purchase by WUTelCo of 250,000 shares of Class B stock in the new company. The stock would have been entitled to dividends equal to 25% of all profits of WUI in excess of $1,000,000 in 1962 and thereafter. Citing the above-mentioned 1954 Court of Appeals ruling concerning divorce of WUTelCo from "all financial interest in international telegraph operations", the Commission rejected this

portion of the divestment plan as:

> "inconsistent with Section 222 and unlawful... it would create a new community of interest between Western Union and the new company. While it is true that pre-existing conditions might operate to prevent what Western Union calls a perfect divestment, this does not mean that Western Union is free to create new conditions to prevent the separation sought by Congress". 30 F.C.C. 323, 340 (emphasis supplied).

33. Telegraph Service With Hawaii is dispositive of this question. WUTelCo concedes that this decision is damaging to its case (Application For Review, p. 19) and asks, in effect, for a reversal of the unfavorable portions. In the Hawaii case, the Commission ruled:

> "We must conclude therefore that in Section 222 Congress intended that, as a condition to its merger with Postal Telegraph, Western Union, as a domestic telegraph carrier, must withdraw from competition with the international telegraph carriers to overseas points, whether they be foreign points or interstate points under Section 3". 28 F.C.C. 599, 604 (1960) (emphasis supplied).

34. WUTelCo argued in that case that statutes are not static but have prospective application and that emerging factual situations, not in existence at the time Section 222 was enacted, may thereby be affected. WUTelCo contended that it was therefore unreasonable to conclude that Congress meant forever to bar WUTelCo from providing service to Hawaii and to prevent the Commission from authorizing WUTelCo to provide such service to Hawaii if found to be in the public interest. The Commission

rejected this argument by stating the following:

> "While this Western Union argument may have validity as a general principle of statutory construction, it is not applicable to section 222. As we have stated (see pars. 10-22), one of the basic purposes of Congress in enacting section 222 was to fix firmly, on a geographic rather than political basis, the area of service, i.e., overseas operations, prohibited to the merged company. Such purpose is consistent with the canon of construction advocated by Western Union and makes it inapplicable to the instant situation". 28 F.C.C. at 606.

35. The Commission, cognizant of the history and objectives of Section 222, acknowledged that it lacked the requisite power to authorize WUTelCo to furnish services to Hawaii even if substantial public benefits were involved:

> "Since service to any of these points [Hawaii, Puerto Rico, the Virgin Islands, as well as other overseas locations] is undoubtedly an international telegraph operation, we cannot order or permit Western Union to provide such service, no matter how urgent the public interest. If we find that the public interest requires that we should possess such power, the remedy is to ask Congress to amend section 222, not for us to misinterpret it." 28 F.C.C. at 605.

36. The Commission, considering the question of whether legislation should be recommended to Congress to amend Section 222 which would in turn invest the Commission with the power to authorize WUTelCo to provide service to Hawaii, if it were so disposed, concluded the

following:

> "We have no reason to believe that Congress was mistaken as to the dangers of Western Union competition in the overseas telegraph field. To the contrary, in a recent proceeding, in which we reviewed the problems presented by Western Union operations in the overseas field [Western Union Divestment, 25 F.C.C. 35, 87 (1958)], we concluded that --
>
> > 'the reasons which impelled Congress to require divestment of Western Union's [international] telegraph operations have been amply justified by experience under a combined land-line-cable operation.'
>
> "In view of all this, we feel that the original considerations which led to the denomination of service with Hawaii as an international telegraph operation prohibited to the domestic telegraph-carrier are valid today." 28 F.C.C. at 608 - 609 (emphasis supplied).

37. In view of the foregoing, the Commission ruled that Section 222 was designed to specifically restrict WUTelCo's operations "to its historic area of landline service, and to preclude it from competing for traffic to overseas areas, including Hawaii." 28 F.C.C. at 607.

38. In addition to its consistent rulings that Section 222 is an absolute bar to WUTelCo international operations, the Commission staff has so testified before Congress that:

"Senator LAUSCHE: 'After they divest, will they be completely outof the international field? Mr. WOODWARD: Yes, sir".[7]

Also, the Commission has strongly recommended that Congress reject any proposal for a repeal of the divestment requirement.[8]

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7. Testimony by Chief, International Division, Common Carrier Bureau, Hearings on S. 3646 (Removal of Divestment Requirement of Section 222 of Communi-Cations Act of 1934) Before the Committee on Commerce, U.S. Senate, 87 Cong. 2d Sess., p. 22 (1962), cited hereinafter as Hearings on S. 3646. Also see this petition, infra, pp. 22, 26.

8. Letter of October 4, 1960 to Senate Commerce Committee.

VI. WUTelCo Has Consistently Acknowledged The Requirements of Total Separation From Any International Operations

39. Over the years, WUTelCo has itself conceded that Section 222 bars it from any participation in international operations. In connection with the 1954 divestment case, for example, WUTelCo referred to "the policy against the domestic telegraph company continuing in the international telegraph field, as expressed by the divestment mandate in Section 222(c)(2)".[9]

40. In the same proceeding, WUTelCo correctly interpreted the purpose of the divestment requirement to encompass continuing future separation of WUTelCo from international operations. In opposing the suggestion that WUTelCo continue as guarantor under the Anglo lease, subsequent to divestment, WUTelCo argued:

> "Not only does the simple expedient of leaving Western Union liable on the lease fail to provide the neat solution to the problem, but also it would present the question, blindly disregarded by the Bureau, AC&R and RCAC, whether an assignment of the cables under such circumstances would be 'divestment' within the meaning of the Act. We think that it will be agreed that the divestment requirement was included in the Act because of the possible incentive and opportunity for the Merged Company to favor its affiliated Cable system. In the language of former Commissioner Durr, referred to in Paragraph 99 of the Bureau's Proposed Findings,

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9. Proposed Findings of Fact and Conclusions of the Western Union Telegraph Company, Docket No. 10151, June 21, 1954, p. 59.

> it was to eliminate the factor of 'self interest'. If Western Union is to remain financially responsible for the observance of the Anglo lease, whether the assignee is a new company or one already in the communications field, will the incentive and opportunity for the Merged Company to favor that company be any different from that which exists today? Will the factor of self interest have been removed? Further, would there not be inherent in an assignment coupled with a continuing guaranty, particularly if to a company new in the field, the possibility of a reacquisition of the assigned properties in the event the new company found it impossible to survive and Western Union was forced to protect its guarantor's position?" Reply of WUTelCo, July 6, 1954, p. 7.

41. WUTelCo summarized its argument in this connection as follows:

> "Certainly, Congress did not intend divestment per se. It sought to eliminate certain dangers which might exist from joint operation of a domestic and an international system. If the dangers are not eliminated, what possible public interest will be served by substituting a new situation for the old? Not only will the old evils remain, but new ones will be created." Id., p. 8.

42. These WUTelCo arguments, that future separation of WUTelCo from the international field is necessary to effectuate the goals of Congress, are in direct conflict with WUTelCo's current arguments that through use of the word "theretofore" in the divestment subsection WUTelCo is free to re-enter the international field. If this interpretation were correct, WUTelCo could have acquired

or constructed a whole new complex of international facilities and operations on the day after divestment or any time since. Such a contention, that Congress intended "strict surveillance of contemporary competition without also intending to limit the danger of Western Union... expansion in the future", is utterly without support in the legislative history and has been judicially rejected. Western Union Telegraph Company v. United States, 217 F. 2d 579, 582 (2d Cir. 1954).

43. In the past, WUTelCo has recognized its exclusion from the international field and has attempted to obtain legislative relief. In 1962, WUTelCo testified before the Senate Commerce Committee in favor of a bill to remove the divestment requirement from the Communications Act. The WUTelCo witness acknowledged WUTelCo's fundamental infirmity:

> "Senator LAUSCHE: Now then, this law that was passed in the forties declared that your business in the long run shall be confined to domestic service and not international, is that correct.
> Mr. BARR: That is correct.
> Senator LAUSCHE: And it also contained the provision that you had to divest.
> Mr. BARR: That is correct."[10]

In 1959, WUTelCo had suggested to the same Committee that Congress should repeal the divestment requirement.[11]

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10. Hearings on S. 3646, p. 8 (testimony of Samuel M. Barr, Vice President for Planning) (emphasis supplied).

11. Id., p. 16

44. Additionally, in its Report on the International Telegraph Industry prepared for the Cabinet Committee on Telecommunications Policy and Organization, dated December 20, 1954, WUTelCo complained: "But, Western Union alone, of all the international telegraph carriers, is under a mandate to get out of the international telegraph business." Report, p. iv. In its conclusion, WUTelCo recommended the following legislative steps:

> "1. Pending consideration of the terms and provisions of legislation recommended below, immediate legislative action be taken to eliminate the divestment requirement, Section 222(c)(2), of the Communications Act; or
>
> 2. Section 222 be amended by the elimination of Section 222 (c)(2), with the addition of provisions which would permit the merger or consolidation of international telegraph carriers with the domestic telegraph carrier; or
>
> 3. That Section 222 be amended by the elimination of Section 222 (c)(2), with the addition of provisions which would permit the merger or consolidation of international carriers, including the acquisition by international telegraph carriers of the international telegraph business of the domestic telegraph carrier". Report, p. iv.

45. WUTelCo's efforts over the years indicate a full realization of its disability from participating in international operations. None of its various legislative suggestions has been adopted by Congress. The Commission must not permit an evasion of Congressional intent through faulty interpretation of the legislative scheme.

VII. Congress Has Given No Authority to the Commission to Permit WUTelCo to Operate in the International Sphere

46. Section 222 is a clear case of Congressional circumscription to authority delegated to an administrative regulatory agency. The Bureau has correctly pointed out that "the Commission, therefore, has no authority to grant the instant application, even if it were considered in the public interest, absent an amendment of Section 222 of the Communications Act" (Decision, p. 6).

47. The Commission has consistently recognized since 1943 that the wording and legislative history of Section 222 have limited the Commission's authority in this area and negated its customary flexibility. In the 1943 Application for Merger decision, for example, the Commission recognized that:

> "Although paragraph (1) of Section 222 (c) provides that applicants to the Commission for approval of a proposed merger may submit an amended proposal, the Commission is given no authority under Section 222 to impose terms or conditions in any order approving and authorizing a consolidation or merger. Such authority was incorporated in various drafts of the bills which preceded the bill which became Section 222, and the desirability of such a provision was urged on the Congress by this Commission, but it was omitted from Section 222 as passed. In the absence of such authority in the legislation, the Commission can only approve or disapprove a proposed consolidation or merger on the terms presented to it" 10 F.C. C. 148, 151.

48. Even the dissenting Commissioner agreed that, "the act gives the Commission no power to impose conditions to its approval. It must either approve or disapprove what the Company places before it." 10 F.C.C. at 183. Of course, under normal circumstances, the Commission has broad authority to impose terms or conditions it may devise in order to promote the "public interest."

49. In Telegraph Service to Hawaii, the Commission concluded that it was without power to permit

WUTelCo to provide international service. It pointed out that, "the remedy is to ask Congress to amend Section 222, not for us to misinterpret it." 28 F.C.C. 599, 605 (1960).

50. WUTelCo has similarly recognized that "Relief from this onerous requirement cannot be obtained from either the Commission or the Courts but can only come from Congress. Hearings on S. 3646, p. 9.

51. It is noteworthy that the Commission's Hawaii ruling has been in existence for more than 12 years and no Congressional action has been forthcoming, notwithstanding the above-mentioned WUTelCo efforts at legislative relief. This re-enforces the conclusion that the Commission has correctly reflected Congressional intent. Congress' failure to repeal or revise in the face of such administrative interpretation has been held to constitute persuasive evidence that this interpretation is the one intended by Congress.[12]

52. Despite WUTelCo's citation of cases in which administrative agencies have been permitted to assume regulatory jurisdiction, it is clear that such agencies are creatures of Congress and operate under authority of enabling statutes. They are limited by the powers granted by Congress and may not assume jurisdiction in excess of these statutory powers. In Section 222, Congress has

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12. Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 53 S. Ct. 350 (1932); United States v. Midwest Oil Co., 236 U.S. 459, 35 S. Ct. 309 (1914).

negated the Commission's authority to authorize WUTelCo to provide international record services. There are other examples of denial of certain authority to the Commission by Congress.

53. In United States v. Radio Corporation of America, 358 U.S. 334 (1959), the Supreme Court rejected an argument that Commission approval of broadcast licensees' exchange of television stations operated to sanction the transaction for all purposes, including attack under the antitrust laws. In reviewing the relevant legislative history of Communications Act § 311, governing broadcast authorizations, the Court found significant that a defeated draft of the bill empowered the Commission to refuse a license to a company, found by "... the Commission to have been unlawfully monopolizing" radio communications. 358 U.S. 334, 342. The specific rejection of this language was found to "compel the conclusion that the Commission was not intended to have any authority to pass on antitrust violations as such." 358 U.S. at 343.

54. In the present matter, a Senate study of the telegraph industry recommended that merger legislation should:

> "Not prevent the inclusion of all existing operations of any domestic carrier, which may be engaged partially in international telegraph communications, into the merged domestic enterprise, and should empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations if found to be in the public interest..." S. Rep. No. 13, p. 4.

55. However, Congress rejected this approach, and as enacted, the merger bill explicitly withdrew Commission power to determine the future character of the merged carrier by making divestment of international operations and the restriction of future acquisitions to domestic facilities a matter of statutory compulsion. Section 222 (b) (2), (c) (2).

56. Thus, the express rejection of the initially proposed broad Commission regulatory authority is clear evidence that Congress intended that the merged carrier be absolutely restricted to domestic operations, with no Commission power to alter, amend or modify that requirement, and further intended that the Commission be limited to supervision of the mechanics of merger.

57. Western Union Telegraph Company v. United States, 267 F. 2d 715 (2d Cir. 1959), emphasized the sharply circumscribed authority of the Commission when the court reversed a Commission order imposing a deadline for the submission of a divestment plan. The Court concluded that the Commission lacked authority to impose a deadline absent specific findings concerning the legislatively mandated conjunction of "due diligence" with the requirements of "commensurate value" of consideration and resolution of the "legal obligations" under the cable lease.

> "While mindful of the limited scope of the judicial review where the Commission had made a choice of 'means of achieving the statutory policy' we are nonetheless persuaded that the order of July 9, 1958 is without statutory warrant in fixing an unconditional deadline for submission of a plan of divestment, without regard to whether exercise of 'due diligence' could produce, within the time fixed a feasible plan which would meet the two requirements of the statute..." 267 F. 2d at 724.

58. Thus, whatever deference must be given to the Commission's general powers to regulate, by reason of its "specialization... insight... experience and ... flexibile procedure, " (Application for Review, p. 16) such a doctrine is applicable only with respect to "issues, which under a regulatory scheme, have been placed within the special competence of an administrative body." United States v. Western Pacific R. Co., 352 U.S. 59, 64 (1956). As shown above, the regulatory scheme under present consideration gives no competence to the Commission to determine the merits of merger, but specifically and unequivocally requires the monoply resulting from domestic merger to restrict itself to domestic operations. This situation of course is readily distinguishable from instances where the Commission may liberally exercise its general regulatory powers when Congress has not provided prescribed

and squarely cornered boundaries of jurisdiction. E.g., United States v. Southwestern Cable Company, 392 U.S. 157 (1968).

59. Thus, upon admission of Hawaii to statehood, the Congress amended Section 222 (a) (10) specifically to exclude the new State from the definition of "Continental United States" P. L. 86-624 (1960), which definition affects the scope of "domestic" and "international telegraph operations." Section 222 (a) (5), (6). Had Congress considered the Commission to have the broad regulatory power urged now by WUTelCo, there would have been no need for the clarifying amendment, and the subject would have been left entirely for Commission determination. Rather, the Commission was recognized to have no authority but to suggest to Congress changes in the scheme fixed by the merger statute. See, H. R. Rep. No. 1564, 86th Cong., 2d Sess. 3 (1960).

VIII. Section 222 Must Be Construed To Effectuate The Goals of Congress

60. WUTelCo urges a strained construction of Section 222 as a statute which restricts the conduct of business. To the contrary, the statutory permission for merger conferred a substantial benefit upon WUTelCo.

61. Congress viewed the legislation as an exceptional grant of a monopoly, otherwise prohibited by the antitrust laws. H. R. Rep. No. 69, p. 1. Concern was expressed respecting formation of a "huge, over-all single telegraph-cable-radiotelegraph combine." S. Rep. No. 13, p.3. Rather than burdening WUTelCo, the merger statute was considered to grant the company the extraordinary privilege of freedom from competition. The bill was passed despite pointed objection to it as creating "a fixed monopoly of the most dangerous kind"; "one of the biggest grabs that has been made before Congress in a good many years"; "the greatest monopoly in the telegraph field the world has ever known." 89 Cong. Rec. 772, 778, 779 (1943).

62. Similarly, the Commission has pointed out the extraordinary benefit conferred upon WUTelCo:

> "Insofar as Western Union is concerned, it is evident that the anti-monopoly feature of National communications policy has not handicapped the telegraph company in the provision of the public message service or in diversification. On the contrary, permission to merge Postal Telegraph and Western Union created the basis for a reorganization of the industry

and a program of modernization and replacement of obsolete plant."13

63. Thus, if any aphorism may be applied to the merger legislation, it is that since monopolies are privileges restrictive of a free economy, the rights which Congress has granted to them must be strictly construed. See, United States v. Masonite Corporation, 317 U.S. 265, 280 (1942).

64. Accordingly, the rights of the domestic monopoly to operate in the international sphere should be extended no farther than was specifically granted by Congress: the right to engage in international operations only until the time of divestment. Whatever rights WUTelCo is not specifically granted by the merger statute, it may not now assume, absent legislative amendment. If WUTelCo is allowed to return to international telegraph operations, we would be back to the point which required Congress to act, in the form of Section 222, in order to avoid all of the anticompetitive effects of permitting a domestic telegram monopolist carrier to participate in international operations in competition with independent international carriers. If it succeeds in its endeavor, WUTelCo will have enjoyed all the massive benefits of the merger legislation, while evading the reciprocal condition imposed by Congress.

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13. Report of Telephone and Telegraph Committees in the Domestic Telegraph Investigation, April 29, 1966, Docket No. 14650, pp. 215-216.

65. It must be emphasized that Section 222 was permissive legislation. As WUTelCo has itself noted:

> "Section 222 did not require Western Union to divest itself of its international operations. It provides merely that, as a condition of voluntary merger, this should be done."[14]

66. In addition to the valuable right to merge with Postal Telegraph, Congress included (b)(1) in Section 222 for the specific purpose of permitting WUTelCo to acquire the TWX system from AT&T. 24 F.C.C. 2d 664, 667-8. This acquisition, considered a boon for WUTelCo,[15] has been effectuated, placing WUTelCo in a "new monopoly position"[16] in the domestic teletypewriter exchange service.

67. As a further attraction to WUTelCo, Congress required a finding that the consideration for the divested property be "commensurate with its value". Section 222(c)(2). WUTelCo's decision, under all of the circumstances of the statutory scheme, was to go forward with the domestic merger, thus triggering the divestment mechanism.

68. In its argument for a strained construction of the divestment requirement, WUTelCo turns to an analysis of divestments under antitrust decrees. All of the antitrust

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14. Proposed Findings of Fact and Conclusions of WUTelCo, Docket No. 10150, June 21, 1954, p. 31.
15. Domestic Telegraph Investigation, pp. 312 - 313.
16. 24 F.C.C. 2d 664, 688.

cases now relied upon by WUTelCo are inapposite. WUTelCo has itself already distinguished the Section 222 legislative scheme from judicial antitrust decrees:

> "However, it is clear that Congress did not seek to punish Western Union for its merger with Postal. This is the fundamental difference between directed divestments under the Anti-trust Laws and the Public Utility requirement in the Communications Act."17

69. Narrow interpretation is more apt for antitrust decrees, which are required by statute to "be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained" 38 Stat. 738; see F. R. Civ. P., rule 65(d); Schine Chain Theaters v. United States, 334 U.S. 110, 126 (1948). Moreover, judicial divestment decrees are necessarily and precisely confined to divestment. The legislative divestment mandate in Section 222 provides divestment as but one element of a broad and comprehensive scheme to alter radically the structure of the record communications industry through permissive merger within geographical bounds.

70. Similarly, antitrust consent decrees are bilateral creations, "entered into by parties to a case after careful negotiation has produced agreement on their

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17. Proposed Findings, supra, p. 20.

precise terms." United States v. Armour & Co., 402 U.S. 673, 681 (1971). As such they are irrelevant to this proceeding. No element of bargaining between WUTelCo and the Congress of the United States may be gleaned from the circumstances surrounding the merger statute. Rather, as with all legislative enactments, the legislation was created and fashioned by Congress, and it is to legislative policy and purpose that we must turn for guidance.

71. In advocating its narrow interpretation, WUTelCo argues that the divestment condition does not contain the words "subsequent to the divestment, the merged carrier is precluded from providing any international telegraph operations." Application for Review, p. 8. The Commission will not put on blinders. The divestment provision is but one part of the merger statute. The statutory scheme as a whole, together with the legislative history, provides the inescapable conclusion that WUTelCo is prohibited from engaging in international operations. There was a Congressional determination that the merged domestic telegraph carrier would be in an intolerable conflict of interest position as a competitor of independent international carriers. Congress did not merely prescribe a temporary relief; it devised a permanent cure.

72. WUTelCo's argument that the existence of the word "theretofore" in the divestment subsection (222)(c)(2) of the merger statute should permit it to circumvent the entire statute is similarly without merit. The words, "international telegraph operations theretofore carried on," are obviously merely descriptive of what was to be divested and cannot reasonably be construed as conferring any rights upon WUTelCo to overturn the entire statutory scheme by re-entering or reacquiring international operations. WUTelCo's misplaced reliance upon the single word "theretofore" also becomes even more apparent by reference to the following explanation in the legislative history:

> "Paragraph (2) provides for the divestment by the merged or consolidated domestic telegraph carrier of any international telegraph business it may carry on." S. Rep. No. 13, p. 8.

73. Time and time again courts have rejected strained and tortured attempts at statutory misconstruction, such as WUTelCo attempts now, by parties who seek to single out isolated words to distort an overall statutory scheme. For example, the United States Supreme Court has held:

(1) "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with

them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation." United States v. American Trucking Ass'ns., 310 U.S. 534, 542 - 543 (1940).

(2) "Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensible inconsistent provisions." Boys Markets, Inc. v. Retail Clerk's Union Local 770, 398 U.S. 235, 250 (1970).

(3) "We believe it fundamental that a section of a statute not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence but [should] look to the provisions of the whole law, and to its object and policy.'" Richards v. United States, 369 U.S. 1, 11 (1962) (quoting United States v. Boisdores Heirs, 8 How. 113, 122) (footnote omitted).

(4) "The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, e.g. Rector, etc. of the Holy Trinity Church v. United States, 43 U.S. 457, 459 - 462; 12 S. Ct. 511, 512 - 513; 36 L. Ed. 226; Markham v. Cabell, 326 U.S. 404, 409; 66 S. Ct. 193, 195; 90 L. Ed. 165, for 'literalness may strangle meaning'. Utah Junk Co. v. Porter, 328 U.S. 39, 44; 66 S. Ct. 889, 892; 90 L. Et. 1071." Lynch v. Overholser, 369 U.S. 705, 710 (1962).

(5) "Legislative intent is to be determined 'not by taking the word or clause in question from its setting and viewing it apart,

> but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances for its use, and other appropriate tests for the ascertainment of the legislative will." Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 93 (1934).

74. Clearly, decades of consistent judicial and administrative interpretation of the merger statute, and the telegraph industry's reliance upon those interpretations, may not now be reversed upon the sole basis of WUTelCo's discovery of a single word in a one subsection of the statute. The statute must be read as an integrated whole, a broad and pervasive scheme to reorder the telegraph industry and the relations of regulated carriers with each other. So read, the combined effect of, and inescapable conclusion drawn from, all of the related statutory provisions is that WUTelCo is restricted solely to domestic operations.

IX. WUTelCo May Not Provide International Mailgram Service

75. As has been demonstrated, WUTelCo may not provide any international record operations. Relying on the word "theretofore", WUTelCo argues that since mailgram did not exist in 1943, international mailgram is not now barred to WUTelCo.

76. Many other services which did not exist in 1943 have been introduced in the intervening years. Yet, until now, WUTelCo has never claimed that it could provide such services internationally. As noted by the Bureau's Decision, p. 4, in the Hawaii case WUTelCo failed to argue that it should be permitted to provide telex service to Hawaii since telex did not exist prior to the domestic merger. Nor, at any other point in the nearly 15 year history of WUTelCo's telex service has WUTelCo contended that it should be permitted to provide telex to international points. Under WUTelCo's new theory, at the time of divestment, WUTelCo could immediately have re-entered the international field through the important new telex service. In actual fact, Western Union Cables' telex service was included as part of the divestment and, in its 1961 Western Union Divestment decision, the Commission applied the same principle of separate and nondiscriminatory treatment by WUTelCo for international telex as for international message service. 30 F.C.C. 323, 375.

77. It is noteworthy that WUTelCo has persistently contended that Section 222 encompasses all record services, including those which have been introduced since divestment, in its numerous attempts to curtail proposed international record carrier expansion into the domestic sphere, while inconsistently advocating a narrow and insupportable construction of Section 222 herein.

78. WUI's recent pleading in the domestic satellite proceeding,[18] which is incorporated herein by reference, contains numerous examples of WUTelCo's arguments advancing the proposition that Section 222 contemplates all forms of record communication services.

79. One such example, which aptly summarizes WUTelCo's position, concerns WUTelCo's application dated March 19, 1971 which requested authority to lease and operate satellite circuits for the provision of communication services between Alaska and the lower 48 states. WUTelCo stated in its application, p. 1, that the subject facilities "are intended for the relay of domestic and international traffic, <u>including public message, telex, private line (including alternate voice-data)</u>, and any and all forms of record message traffic." (Emphasis supplied.) WUTelCo also commented upon the applications of RCA and

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18. WUI Opposition to Supplemental Statement of WUTelCo, dated May 12, 1972, Docket No. 16495.

WUI,[19] which proposed to provide the same full range of record services between Alaska and the lower 48 states as contemplated by WUTelCo. In this regard, WUTelCo argued that the applications of the international carriers encompassed domestic relay functions in violation of Section 222 of the Act. WUTelCo further stated on p. 5 of its application that:

> "... WUI, ITT Worldcom, and RCA Globcom are barred from operation in the domestic sphere of activity. The proposal by the international carriers to relay traffic between Jamesburg and Talkeetna represents an attempt by them to invade the domestic sphere of record message communications, which the Commission is obliged to prevent under Section 222 of the Act."

80. Accordingly, WUTelCo has construed Section 222 as applying to all record services, regardless of whether they were in existence at the time of merger, when it has sought to safeguard its domestic franchise. WUTelCo, therefore, cannot have it another way when attempting to encroach upon the international record carrier domain of operation. Both WUTelCo's Reply of May 22, 1972 to WUI's above-mentioned pleading and WUTelCo's instant application fail even to address the readily apparent inconsistencies of its position.

81. In any event, the definitions of domestic

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19. File Nos. P-C-7585, T-C-2318, 2318A and T-C-2274, 2274A.

and international telegraph operations underlie the entire legislative scheme of Section 222. By virtue of these definitions, Congress was neither concerned with the variations and types of record services covered by Section 222, nor the time of their introduction, but rather with the geographical areas of operation within which the merged carrier may and may not operate. As has been demonstrated hereinabove, WUTelCo may only provide record services within the specifically delineated areas defined by the operative phrase "domestic telegraph operations" and is absolutely precluded from operating in the area covered by the definition of "international telegraph operations." Consequently, there is no merit to WUTelCo's argument that its proposed mailgram service to Hawaii is a new and innovative service which is not precluded by operations of Section 222 since it was not in existence at the time of merger.

X. Conclusion

82. It is clear from all of the foregoing that WUTelCo is barred by statute from providing international mailgram service, irrespective of the public interest considerations involved. Nevertheless, WUTelCo has demonstrated no public interest reasons why it should be permitted to provide international mailgram service. As demonstrated by WUI's expeditious and cooperative efforts with both the Commission and the United States Postal Service, WUI is fully prepared to furnish this service to U.S. overseas points.[20] Additionally, WUI is preparing to provide this service to foreign overseas points.

83. WUTelCo makes much of the comparative rate proposals between the U.S. Mainland and Hawaii. WUTelCo fails to recognize that both its own and the international carriers' offerings are experimental in nature and may, with the passage of time, require rate amendments. Even after more than two years of market testing and experimental service, WUTelCo has found it necessary to extend its "experimental" domestic mailgram tariff to allow "additional time to refine [WUTelCo's] cost analyses to reflect the company's actual experience with mailgram service." WUTelCo Transmittal No. 6743, May 31, 1972. Consequently, introductory, experimental rates cannot be accorded the

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20. All three international record carriers have applications on file for "telepost" service to U.S. overseas points.

significance advocated by WUTelCo.

84. As a gambit to re-enter the international field, WUTelCo offers a depressed international mailgram rate structure not even based upon telex rates, as is the case domestically. WUTelCo has suddenly acquired a new-found sympathy for the rate payer -- particularly when another industry's revenue is at stake.[21] However, WUTelCo's sorry record of rate increase piled upon rate increase demonstrates that it is not always so solicitous of the rate payer. To date, WUI has shielded the international rate payer and absorbed the repetitive WUTelCo telex rate increases for interconnected overseas/domestic hinterland calls. WUTelCo's telex increases -- absorbed by WUI -- totaled 50% during 1970 and 1971. In 1966, WUTelCo's message landline charges were increased, but again WUI was the buffer who absorbed the impact and held the line on its charges to the public in Hawaii. On the other side of the coin, WUI has reduced private line lease rates between the Mainland and Hawaii by 50% since 1965, and has reduced telex rates at Hawaii by virtue of reduced minimum charging periods and lower minute-by-minute rates. History has taught that the competitive impetus of the international industry is more likely to exert a downward push on rates than the domestic

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21. On the other hand, when WUI offered to extend substantial rate and service benefits to commercial subscribers just across the corporate bounds of Washington, D. C., WUTelCo argued that WUI was prohibited by Section 222. Petition for Suspension or Rejection of WUTelCo, February 28, 1971, Transmittal No. 676.

monopoly.

85. The fact is that the statutory inhibitions of Section 222 are directed against the recipient of its considerable benefits--WUTelCo, who voluntarily accepted both the benefits and inhibitions. There is nothing unjust or unfair about this basic limitation, as inferred by WUTelCo. The bar from participating in international operations is a relatively minor condition upon a beneficial grant to WUTelCo--the right to attain monopoly status, free of antitrust concerns. WUTelCo has taken advantage of Section 222 to effectuate two important acquisitions--Postal Telegraph and the TWX system.

86. WUTelCo's "narrow construction" argument that, having divested itself of its former international division, it is now free to re-enter the international field, makes a mockery of the statutory scheme represented by Section 222. If international services such as mailgram or telex or datel, which did not exist in 1943, are considered outside the restrictions of Section 222 and open to WUTelCo, these arrangements must also be outside Section 222's shield against the antitrust laws. Penetration by the domestic monopoly into international mailgram would present substantial opportunity for channeling the domestic mailgram business into competitive benefits for WUTelCo's international mailgram operation and would raise serious antitrust questions under

the Sherman and Clayton Acts and Section 314 of the Communications Act. Divestment would be the likely remedy. If all of this sounds familiar...it is. Congress settled this very point in 1943 by barring WUTelCo from international operations.

WHEREFORE, WUI respectfully requests the Commission to dismiss or deny WUTelCo's Application for Review, or alternatively, affirm in all respects the Bureau's Decision that Section 222 bars WUTelCo from providing international mailgram service.

Respectfully submitted,
WESTERN UNION INTERNATIONAL, INC.

By:/s/ Robert E. Conn

/s/ Ernest Brod

/s/ Alexander D. van Eyck

/s/ Howard L. Stevens

Attorneys

26 Broadway
New York, New York 10004

June 26, 1972

CERTIFICATE OF SERVICE

I, Evangeline A. Hardy, hereby certify that on this 26th day of June, 1972, I mailed by United States mail, postage prepaid, a copy of the foregoing to the following:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)
	)
THE WESTERN UNION TELEGRAPH COMPANY	)
	)
Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Lease and to Operate Facilities to Extend MAILGRAM Service Between the United States Mainland and Hawaii	)

To: The Commission

REPLY OF WESTERN UNION TO OPPOSITIONS
FOR APPLICATION FOR REVIEW

The Western Union Telegraph Company (Western Union) hereby replies to the pleadings filed by RCA Global Communications, Inc. (RCA Globcom) and Western Union International, Inc. (WUI) to Western Union's application for review (hereinafter referred to as "Petition") of the Common Carrier Bureau's determination that Section 222 of the Communications Act precludes the Commission, as a matter of law, from granting the above-captioned application. /

The basic issue in this proceeding is whether Congress intended in enacting Section 222 of the Communications Act in 1943 to restrict the Commission's authority under Section 214 of the Communications Act by forever precluding it from authorizing Western Union to provide any international telegraph

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/ While WUI's pleading is entitled a petition to dismiss or deny, it appears to be the equivalent of the opposition pleading which is provided for in Section 1.115(d) of the Commission's Rules. Any paragraph references cited, unless otherwise indicated, refer to the above pleadings.

operations irrespective of how compelling the public interest considerations might be at some future date for allowing Western Union to provide such a service. It would have been most anomalous for Congress to have so intended since most statutes pertaining to regulatory agencies are designed to allow them flexibility to deal with problems under constantly changing circumstances, and there appears to be no valid reason for Congress to have deviated from that practice in enacting Section 222.

To take an extreme situation to illustrate the improbability that Congress intended to so restrict the Commission's flexibility, we note that under such a restriction the Commission would be precluded from authorizing Western Union to provide an international telegraph operation even during a national emergency and even if such an operation were desperately needed to help alleviate such an emergency situation.

Our adversaries have been unable to point to any provision in Section 222 or any pertinent legislative history which would indicate that Congress intended such a drastic step; they have been unable to refute our contention that once Western Union divested itself of its international telegraph operations the divestment provision of Section 222 was executed and therefore has no further effect; they have been unable to refute any of the cases we discussed for the proposition that a divestment provision ceases to have effect after the divestiture is carried out; they have been unable to cite one Commission decision relating to Section 222 decided after the divestiture was

carried out which supports their position; and they have been unable to cite any judicial opinion relating to Section 222 which is relevant to the legal issue involved herein. Yet our adversaries steadfastly argue that Congress did so intend to restrict the Commission's authority. _/

I. Section 222 Does Not Restrict the Commission's Authority So As to Preclude It From Ever Authorizing Western Union to Provide Any International Telegraph Operations.

Western Union in its application for review demonstrated that there is no provision in Section 222 which can validly be construed as restricting the Commission's authority so as to preclude it from authorizing Western Union to provide any international telegraph operation irrespective of whether such an authorization would be in the public interest. Western Union pointed out that if Congress had intended to eternally preclude it from providing an international telegraph service, it would have explicitly provided so in the statute. WUI appears to argue that an analysis of the statutory scheme of Section 222 indicates that Western Union is barred from providing all international operations. However, for the reasons discussed below, such an analysis demonstrates just the opposite.

_/ We note that two of the four international telegraph carriers, ITT World Communications Inc. and Tropical Radio Telegraph Company, have not opposed Western Union's application for review of the Bureau's adverse determination.

Section 222 contains two principal operative provisions which are relevant to the legal issues involved herein. Section 222(c)(2) provides that "Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger." Section 222 (b) provides that the consolidated or merged carrier "may acquire all or any part of the domestic telegraph properties, domestic telegraph facilities or domestic telegraph operations of any international telegraph carrier." However, that section precludes such a consolidated or merged carrier (or any domestic telegraph carrier) from consolidating or merging with any international telegraph carrier.

Since Section 222(c)(2) provides that the merged domestic telegraph carrier shall divest itself of all international telegraph operations theretofore carried on, it is necessary that Section 222 contain a careful definition of the term international telegraph operations. Similarly, since Section 222(b) provides that the merged domestic telegraph carrier may acquire the domestic telegraph operations of any international telegraph carrier, it is necessary that Section 222 contain a careful definition of the term domestic telegraph operations. Sections 222(e)(5) and (6) define the term domestic telegraph operations and international telegraph operations, respectively.

In an attempt to support its assertion that the statutory scheme of Section 222 indicates that Western Union is

precluded from ever again providing any international operations, WUI appears to put great emphasis on the fact that the terms domestic and international operations are delineated solely in geographical terms. Thus, WUI states that "this geographical dichotomy between domestic and international operations set forth in Section 222 is dispositive of the issue before the Commission." (Par. 10) However, this is absurd since there is no provision in Section 222 which limits Western Union solely to domestic operations. Indeed, the Commission has recently ruled in FCC 72-98 (Mimeo No. 74581), released February 4, 1972, that Section 222 does not preclude Western Union from providing telegraph operations within Hawaii. The Commission rendered that ruling despite the fact that it was clear that such operations were not domestic telegraph operations as that term is defined in Section 222, and despite vigorous opposition from WUI which contended that Section 222 restricted Western Union to domestic operations.

WUI also finds it significant that the definitions of domestic and international telegraph operations have no chronological limitations (par. 10). Here again, WUI fails to appreciate that the provisions of Section 222 which define domestic and international telegraph operations are solely definitional provisions and not operational provisions. What is significant is that the operational provision which required Western Union to divest itself of its then existing international telegraph operations does not preclude the Commission from ever authorizing Western Union to provide an international telegraph service.

In paragraph 11 of its pleading, WUI points to the fact that Section 222(b) permits the merged telegraph carrier to further acquire the domestic telegraph properties, facilities or operations from either a carrier not primarly a telegraph carrier or an international telegraph carrier, but precludes it from consolidating or merging with an international carrier. WUI interprets this language as limiting the merged domestic carrier to providing only domestic operations. However, Section 222(b) only refers to consolidations or mergers and does not preclude the merged carrier from internally expanding into international operations. Clearly, the internal expansion into international operations by the merged carrier cannot constitute a consolidation or merger.

In paragraph 12 of its pleading, WUI notes that Section 222(b) precludes Western Union from consolidating with an international carrier and that Section 222(c)(2) requires a merged domestic carrier to divest itself of its international telegraph operations theretofore carried on. From the provision requiring divestment and from the provision barring consolidation with an international carrier, WUI erroneously concludes that Western Union is forever barred from international telegraph operations. These provisions, however, demonstrate just the opposite. Once the divestment provided for in Section 222(c)(2) is carried out, that section is executed and therefore has no further effect. Indeed, if it had a continuing effect so as to bar the merged domestic carrier from ever again providing international telegraph operations, it certainly would have been

superfluous for Congress to have provided in Section 222(b)(1) that the merged domestic carrier could not merge or consolidate with an international carrier. It would have been superfluous because if Section 222(c)(2) precludes the merged domestic carrier from ever again providing international telegraph operations as WUI would have us believe, then it certainly would not have been necessary for Congress to have indicated that the merged domestic carrier could not again provide international telegraph operations through merger with an international carrier.

Finally, it is of utmost importance to note that both domestic telegraph operations and international telegraph operations are defined solely in terms of record communications. Indeed, Section 222 applies only to record communications as that term was defined when Section 222 was enacted in 1943. Consequently, despite the completely unsupported contentions of WUI to the contrary, it is manifestly clear that under any interpretation of Section 222, that section would have no applicability whatsoever to such services as video services which cannot be construed as record communications as that term was defined in 1943.

II. RCA Globcom and WUI Have Failed to Uncover Any Pertinent Legislative History to Indicate a Congressional Intent to Forever Restrict the Commission's Authority so as to Preclude It From Ever Authorizing Western Union to Provide Any International Telegraph Service.

Both RCA Globcom and WUI advocate that it is clear from the legislative history of Section 222 that Congress intended to forever after restrict Western Union strictly to domestic telegraph operations (see e.g., par. 15 of WUI's pleading). RCA Globcom in support of that contention refers to statements made during hearings on S. Res. 95 at which witnesses for the Commission and industry urged that a requirement be imposed on a merged domestic carrier to divest itself of its international telegraph operations (par. 5). However, besides the fact that such statements fall far short of advocating the much more drastic step of restricting the Commission's authority so as to preclude it from ever authorizing Western Union to provide any international telegraph operations, RCA Globcom conveniently neglects to point out that after those hearings, the Senate subcommittee before whom these hearings were held submitted a report (S. Rept. 769) to the full Senate rejecting that viewpoint and recommending that such a merged domestic carrier not have to divest itself of its international telegraph operations (see pp. 4 and 5 of Western Union's petition).

Thus, statements made during those hearings could hardly be considered helpful in determining legislative intent.

RCA Globcom also asserts that the Bureau's construction of legislative history is correct (pars. 9 and 10). However, RCA Globcom appears to believe that the Bureau was correct for diametrically opposite reasons than those advanced by the Bureau. Thus, while the Bureau, in support of its position on Section 222, appears to contend that the intent of Section 222 is reflected by a particular recommendation in S. Rept. 769 (see pp. 10 and 11 of Western Union's petition), RCA Globcom appears to find great significance in its belief that that particular recommendation was not adopted by Congress!

While WUI makes no attempt to support the Bureau's reasoning as to how the legislative history supports the Bureau's position on Section 222, WUI does set forth a number of statements made during the time the merger legislation was being considered which are designed to support its position. At paragraphs 20 and 21 of its pleading, WUI refers to two statements by spokesmen of the Commission (who were advocating a particular viewpoint) during House hearings on the merger legislation. Those statements are admittedly favorable to WUI's position although there is some question as to whether those statements contemplated restricting the Commission's authority to the extent that WUI advocates. However, it is

significant that after those hearings, the House Subcommittee before which these hearings were held submitted a report to the full House (H.R. Rep. No. 2664, 77th Cong., 2nd Sess. (1942)) declining to include a divestment provision in the House version of the merger legislation and thus rejecting the position taken by the Commission spokesmen on this matter.

In this connection, we note that it is very significant that Section 222 as finally enacted, was a result of a compromise worked out by House and Senate conferees in the Conference Committee (see Western Union's pleading, pp. 6 and 7). As part of that compromise, the House acquiesced to a provision from the Senate bill, which is now Section 222(c)(2), which required that the merged domestic carrier divest itself of the international telegraph operations theretofore carried on. No similar provision had been contained in the House bill. Thus, under those circumstances, even assuming arguendo that the meaning of the divestment provision is obscure,/ it probably would not be appropriate to go beyond the Conference Report to seek guidance because such other sources might not be an accurate reflection of the legislative intent with respect to the compromise bill. Cf. Davidson v. Gardner, 370 F.2d 803 (6th Cir. 1967), where the court (with two judges concurring in the result)

/ Neither RCA Globcom nor WUI has refuted the contention by Western Union that the clear language of a provision is the best guide to ascertaining Congressional intent and that it is inappropriate to attempt to vary the clear and unambiguous meaning of a provision by reference to legislative history (Western Union petition, pp. 12-13).

at 370 F. 2d 828 indicated that a statement in the House Report was not persuasive of Congressional intent where neither the Senate nor Conference Reports indicated a similar viewpoint.

In any event, it would not be appropriate to go beyond committee reports and explanatory statements by committee members in an attempt to derive the legislative intent. Thus, the Supreme Court in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), stated

> "By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. Aldridge v. Williams, 3 How. 9, 24, 11 L. Ed. 469; United States v. Union Pacific R. R. Co., 91 U. S. 72, 79, 23 L. Ed. 224; United States v. Freight Association, 166 U. S. 200, 318, 17 Sup. Ct. 540, 41 L. Ed. 1007. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. Binns v. United States, 194 U. S. 486, 495, 24 Sup. Ct. 816, 48 L. Ed. 1087. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. Binns v. United States, supra; Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, 198-199, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; United States v. Coca Cola Co., 241 U. S. 265, 281, 36 Sup. Ct. 573, 60 L. Ed. 995, Ann. Cas. 1917C, 487; United States v. St. Paul, M. & M. Ry. Co., 247 U. S. 310, 318, 38 Sup. Ct. 525, 62 L. Ed. 1130." (254 U.S. 443, 474-475)

What is truly significant is that WUI could not find a single statement from the various reports of the Senate, House, and Conference Committees, or from explanatory statements made by various committee members, which supports its contention that the "legislative history of Section 222 clearly shows the

intention to limit [Western Union] strictly to domestic telegraph operations." (Par. 15).

WUI sets forth the following statements by Congressional members or from Congressional reports to support its interpretation of legislative history: (a) A statement that a prime objection to the merger bill was the fear of "the formation of a huge, over-all single telegraph-cable-radiotelegraph combine" (par. 16); (b) A remark indicating that the divestment provision was intended to prevent the merged carrier from competing unfairly with other international carriers (par. 16); (c) A statement that the House had opposed the divestment provision not because divestment would not be "desirable in the public interest, but [that] in view of the certain existing long term contracts it was felt impracticable to require such action to be taken at this time." (par. 17); (d) A statement that the divestment would not create an undue hardship on the companies involved (par. 18).

Manifestly, these statements do not suggest, as WUI would have us believe, that the divestment provision was intended to restrict the Commission's authority under Section 214 of the Communications Act to ever authorize Western Union to provide any international telegraph service irrespective of any circumstances that might prevail in the future. Surely, if Congress had intended to so drastically restrict the Commission's authority, it would have revealed such an intention in a more forthright and less cryptic manner than WUI suggests, and WUI

would have been able to uncover more pertinent statements than those set forth above.

In support of its position with respect to the legislative history, WUI also indicates that "there was a great deal of concern that a merged domestic carrier would have too great a concentration of power and would foreclose competition in the international sphere" (par. 15); and that the fact that the House had opposed the divestment provision should not be construed "as an implicit sanction of a vast domestic international combine" (par. 16). However, WUI overlooks the simple fact that after the merged domestic carrier would divest itself of its international operations, it could not again engage in any international communications operation unless the Commission would find that such an operation was required by the public convenience and necessity pursuant to Section 214 of the Communications Act. Indeed, Western Union would not be "free to return with impunity to the international arena" (par. 22), as WUI would have us believe, but Western Union would only be able to provide an international telegraph operation if it demonstrated to the Commission's satisfaction that the public convenience and necessity required such an operation. In any event, grant of Western Union's Hawaii Mailgram application would hardly result in Western Union becoming a "vast domestic-international combine."

Finally, RCA Globcom points to the absence of a discretionary clause in Section 222 which would permit the Commission to authorize Western Union to again provide international

telegraph operations after divestment (par. 1). However, RCA Globcom overlooks the fact that there was no need to include such a discretionary clause since it was clear that the Commission had such authority under Section 214. Indeed, such a clause would have been redundant and confusing.

III. Divestment Provisions Are Not Interpreted by Courts as Forever Precluding the Divesting Company From Engaging in the Divesting Activity.

Western Union demonstrated in its petition (pp. 8-10) that when a company is ordered by a court to divest itself of a particular operation as a result of a judicial antitrust decree, it is clear that the company is not precluded from ever again engaging in that type of activity unless such a prohibition is specifically included in the decree. The instant situation, where the statute contains a provision to the effect that the merged carrier has to divest itself of its international telegraph operations,but does not contain any provision prohibiting it from again engaging in such operations at some later time, presents an even more compelling situation for holding that the company is not precluded from ever again engaging in the divested activity. This is because unlike the situation presented by the judicial antitrust decree where (unless there is a specific provision to the contrary) the divesting company could again engage in the divested activity, without needing approval from anyone, in the instant situation Western Union cannot again

engage in the divested activity unless it receives approval from the Commission. In order to receive such regulatory approval, Western Union must demonstrate that such an operation is required by the public convenience and necessity.

WUI is unable to refute the logic of this analysis. In paragraph 68 of its pleading, WUI takes out of context (and misquotes) an excerpt from a pleading by Western Union submitted in 1954.[1] In that pleading, Western Union indicated that there is a significant difference between directed divestments under antitrust laws which it characterized as being punitive in nature and the divestment requirement in the Communications Act which it characterized as not being punitive in nature. However, WUI neglects to indicate that Western Union advanced that distinction in advocating that the divestment requirement in the Communications Act is less absolute than the divestment requirement imposed by a judicial antitrust decree, and that perhaps Western Union should not have to divest itself of its international telegraph operations after all. Thus, to the extent that Western Union made a valid distinction in that pleading between divestment provisions in judicial antitrust decrees and the divestment provision of Section 222, this supports Western Union's position that there is even more reason to hold in the instant case, than in cases involving judicial antitrust decrees,

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[1] For the convenience of the Commission we have attached the relevant section of the above-discussed pleading as Appendix A to this pleading.

that in tne absence of a specific prohibition to the contrary a divestment provision will not preclude the company which is subject to the divestment from ever again engaging in the divested activity.

WUI, in its only other discussion of judicial antitrust decrees, in paragraph 69 of its pleading, takes a quote out of context from a case. The quote refers to injunctions and has no applicability to the construction of divestment provisions. Consequently, the cited material is hardly relevant to the proposition WUI attempts to support.

Western Union, in addition to citing a number of cases involving judicial antitrust decrees for the proposition that a divestment provision does not preclude a company from ever again engaging in the divested activity, cited United States v. Armour & Co. 402 U.S. 673 (1971) for the proposition that a strict construction is generally applied to the interpretation of statutes which impose restrictions on the conduct of business (pp. 14-16). Antitrust consent decrees, such as involved in Armour, are different from judicial antitrust decrees in that the former are arrived at by mutual consent of the parties involved while the latter are imposed by the court in a manner similar to Congress imposing a divestment provision. Both RCA Globcom (par. 13, 14) and WUI (par. 70) allude to this distinction in contending that Armour is not relevant. Thus, WUI (par. 70) contends that Armour involves an element of bargaining between the parties involved whereas there

is no evidence of any bargaining between Western Union and the Congress in the imposition by Congress of the divestment provision. However, as discussed later in this pleading, Western Union was basically forced to merge with Postal Telegraph to forestall a worse alternative (competition with a Government-run or subsidized Postal Telegraph) and thus acquiesced to the divestment provision in a manner similar to that of a party consenting to an antitrust consent decree.

That there was a bargaining situation of sorts involved in Western Union's case is indicated by the testimony of President Williams of Western Union before Congress. President Williams testified that "Naturally, whether Western Union will merge or consolidate with any other company is a matter that depends upon the kind of permissive legislation enacted. . . ." (Hearings on S. 2445, p. 79). Thus, the more onerous the restrictions Congress would impose, the more hesitancy Western Union would have in merging with Postal Telegraph. Consequently, the Armour case is highly relevant.

IV. A Further Reason Why The Divestment Provision Should Not Be Broadly Construed Is That Western Union Was Essentially Forced To Acquire Postal Telegraph.

WUI appears to argue that since Western Union received "massive benefits" by being able to merge with Postal Telegraph, it is appropriate to interpret the merger legislation (Section 222) as precluding the Commission from ever authorizing Western Union to provide any international

operations. Thus, WUI throughout its pleadings makes assertions such as that Congress had "bestowed upon WUTelCo the valuable privilege of merger with Postal Telegraph Co." (par. 5); that "Having enjoyed the fruits of the legislative bounty, WUTelCo is now trying to evade the reciprocal statutory restriction." (par. 6); that "Rather than burdening WUTelCo, the merger statute was considered to grant the company the extraordinary privilege of freedom from competition" (par. 61); that "If it succeeds in its endeavor, WUTelCo will have enjoyed all the massive benefits of the merger legislation, while evading the reciprocal condition imposed by Congress" (par. 64); and that "the statutory inhibitions of Section 222 are directed against the recipient of its considerable benefits" (par. 85).

WUI's assertions are completely erroneous. As clearly demonstrated below, Western Union was basically forced to merge with Postal Telegraph because of the fear that unless it would do so the U. S. Government would subsidize or take over Postal Telegraph and thus that Western Union would find itself in competition with the Government, and because of the urging of the War Department that a merger would be helpful to

the war effort.[1]

The following excerpts from a letter (which is reproduced for the convenience of all parties as Appendix B

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[1] Indeed, the Commission noted that the merger legislation provided for only a voluntary merger and went so far as to suggest that because of the war time needs Congress might consider legislation requiring Western Union to merge with Postal Telegraph. Thus, Commissioner Durr testified that

> "In conclusion, this bill, of course, makes merger optional with the companies. It paves the way for a merger on a voluntary basis. We feel very strongly that merger is a desirable step and a very important step now in time of war, that we cannot get the fullest use of our communications system under the present set-up, and that we should use every effort to bring about the merger as soon as possible. I just suggest--I don't know what consideration the committee might want to give to it--that some provision might be added for mandatory merger in the event a voluntary merger is not accomplished within a reasonable period of time." (Hearing on S. 2445 Before the Subcommittee on Interstate Commerce 77th Cong., 2nd Sess., p. 32 (1942) cited hereinafter as Hearings on S. 2445)

Commissioner Durr's remarks were of significant concern to Western Union as evidenced by the following testimony of President Williams of Western Union. President Williams stated that

> "In his remarks before the committee on April 23, Commissioner Durr suggested that consideration be given to the addition of a provision to S. 2445 which would make a merger mandatory, in the event that a voluntary merger is not accomplished within a reasonable period of time. While I am not qualified to comment on the legality of a mandatory merger, I am reluctant to believe that the Congress of the United States would pass legislation which would impose on the owners of a solvent concern another competitive business that has been operating at a loss for more than a decade and owes the R.F.C. $6,000,000.
>
> "In this connection, it should be pointed out that the immediate urgency for this bill appears to be the financial difficulties of another company. The Western Union is solvent and fervently desires to remain so." (Id. at 80)

to this pleading) from Senator Ernest W. McFarland to Western Union recounting the background of the merger legislation is particularly revealing as to this point.[/] Senator McFarland in referring to the merger of Western Union and Postal Telegraph stated

> ". . . that it was pretty much a 'shotgun wedding' - that Western Union had had no choice other than to merge and accept the legislation, or go into competition with the federal government - that Western Union was sound financially, and getting along all right as it was, and would have preferred to continue on this basis rather than to merge with the many restrictions that were imposed by Congress had the alternative not been competition with the government. (Emphasis added)
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> * * * * * * *
>
> ". . . It will be noted from the testimony at the hearings on this bill, and from the report, that this legislation was desirable for the following reasons:
>
> > "1. Postal was going under, having borrowed some nine million dollars from the RFC. They were losing approximately $300,000 a month. Postal, without this subsidy, would have to go into bankruptcy.
> >
> > "2. The second alternative was that the government would have to operate Postal in order to protect its investment. To avoid this it was necessary to bring about a merger.

[/] Senator McFarland's comments are particularly germane because he was the key figure involved in the enactment of the merger legislation. Among other things, Senator McFarland co-authored and handled the merger legislation (Section 222) and was initially a member of, and subsequently Chairman of, the several Senate committees which investigated and reported on the advisability of permitting merger in the telegraph field. See, for example, Hearings on S. 2445, pp. 6 and 7 for a statement indicating that he was responsible for drafting the merger legislation and that in fact he co-authored that legislation.

"It will also be noted from the hearings that Western Union was operating at a profit at the time. The additional argument which was set forth in the report of the Senate was that the government needed the duplicate facilities - that is, equipment and the copper in the wires for war purposes. This had been testified to by General Stoner, representing Army communications (See p. 6 of Report No. 1490, on S. 2598, June 16, 1942). Under those circumstances Western Union had little alternative other than to merge with Postal."

Senator McFarland's analysis is fully supported by pertinent legislative history. That there was a very real possibility that Western Union might have had to compete with the Government if it did not merge with Postal Telegraph is indicated in Senate Reports on the merger. Thus, Senate Report No. 1490, 77th Cong. 2nd Sess., p. 6 (1942) and Senate Report No. 13, 78th Cong. 1st Sess., p. 5 (1943) cite the following extract from a statement made by Senator White in co-introducing merger legislation with Senator McFarland as being particularly pertinent:

"The general cause for this permitted action is the unsatisfactory condition of the whole domestic telegraph industry. The immediate occasion for it is the desperate financial plight of the Postal Co. It is accepted as certain by those familiar with the situation that our two principal domestic telegraph carriers must work out a plan of merger which will merit the approval of our regulatory body, the Federal Communications Commission, or there must speedily come the liquidation of the Postal Co. and its disappearance as a competitive factor in communications.

"A further alternative, Mr. President, might be the taking over and the operation of the Postal System by the Federal Government. This would in turn present to us most serious problems. It would result in direct governmental competition with the Western Union, the present largest unit in the domestic wire communication field; and competition, direct or indirect, by the Government with other methods and means of domestic communication.

"It might conceivably result in the assumption by the Government of the entire burden of domestic wire and point-to-point radio communication. I infinitely prefer to this possibility the unification of the domestic wire companies now operating into a consolidated company within the law and under the watchful eye and the broad regulatory powers of our Communications Commission * * *."

That the War Department urged Western Union to merge with Postal Telegraph is illustrated by the following testimony of Brigadier General Stoner who testified on behalf of the War Department. He stated that

"The War Department favors consideration of the telegraph companies in the interest of economy in the use of critical equipment, materials, and personnel, all of which are necessary now for the use of important defense communication project.

"An illustration of the saving in important critical equipment and material may be had by referring to a recent report published by the Defense Communications Board prepared for publication by the Federal Communications Commission, in which it was stated that there are approximately 13,431 teletype printers in use in business offices. The Postal has approximately 6,550 of these printers. It is assumed that approximately 50 percent of those installations are caused by reason of competitive conditions. It is, therefore, safe to assume that approximately 5,000 of those printers might be diverted to national defense communication purposes in event of consolidation.

"The Postal also has 747 branch offices. Assuming that 500 of those branch offices could be abandoned it would mean an additional 1,200 printers would be released for such other use as might be made of them.

"The War Department at the present time is not able to fill all requirements for teleprinters.

"Consolidation would also further react on other critical materials such as pole line hardware, typewriters, and equipment used in the fabrication of major items of equipment.

"I might also refer to the item of secondary copper. The Postal and Western Union Telegraph Cos. at the present time have parallel circuits along railroad rights-of-way and along highways, running side by side, where the full capacity of both services is not needed and where recovery might be made by doing away with one of the companies' leads, and in so doing there also would be recovery of secondary copper, which is a critical material at the present time." (Hearings on S. 2445, pp. 39-40)

He further testified in response to questions posed by Senator McFarland as follows:

"Senator McFarland. How badly needed are these teleprinters for the war work? And I might say to you at this point, if you would prefer to answer any of these questions in executive session you do not need to answer them here in this open session. How badly needed are these teleprinters?

"Brigadier General Stoner. They are badly needed, sir, and we feel if consolidation would relieve approximately 6,200 of them, as I have suggested, that would help us to meet our requirements for several years.

"Senator McFarland. How about the plants that are manufacturing teleprinters?

"Brigadier General Stoner. The Teletype Corporation is having difficulty now in meeting their requirements. In other words, they were not up to the requirements. I had a communication on that only last week, and it was to the effect that they were unable to make deliveries in the quantities we desired." (Hearings on S. 2445, pp. 41-42)

That Western Union was in sound financial shape at the time of the merger legislation is illustrated by the following testimony by President Williams of Western Union. President Williams stated that

"It is no secret that the immediate urgency for the enactment of permissive merger legislation grows out of the financial difficulties of another telegraph company. Western Union, operating the most extensive telegraph system in the world, has been and is in

sound financial condition. It fervently wishes to remain so, not only in the interest of its employees and stockholders, but even more particularly because the telegraph service, vital during the war, can be furnished only by a solvent concern. I have not referred to the financial soundness of Western Union as a matter of pride; I do so merely to keep the record straight." (Hearings on S. 2598 Before A Subcommittee of the House Committee on Interstate Commerce, 77th Cong., 2nd Sess., p. 64 (1942)).

Thus, contrary to what WUI would have us believe, the merger with Postal Telegraph was essentially forced upon Western Union. This is further reason not to expansively interpret the divestment provision so as to eternally preclude Western Union from engaging in international telegraph operations.

V. The Court Decisions Relied Upon by WUI Are Not Applicable; WUI's Reliance on Commission's Decisions Is Largely Misplaced.

WUI boldly asserts that "Judicial interpretations of Section 222 require exclusion of WUTelCo from any international operations." (p. 12). WUI cites two cases for this proposition. The principal case, Western Union Telegraph Company v. United States, 217 F. 2d 579 (2nd Cir. 1954), relates to the legality of certain contracts between Western Union, on the one hand, and Globe Wireless and Tropical Radio, on the other hand, whereby Western Union assigned all telegraph messages to certain foreign geographical areas to those two carriers and received as a fee for those services a compensation in excess of

that normally charged for landline services and not related to cost incurred by Western Union to perform those contractual obligations. The court upheld the Commission's findings that those contracts were illegal under a Formula adopted and approved by the Commission for the distribution of outbound international traffic which was designed to equitably allocate all international traffic emanating from the continental United States among the various carriers involved in providing international telegraph services. The court also upheld the Commission's finding that the "exorbitant contract prices" paid Western Union might violate Section 222(e).

There appears to be nothing in that case that suggests that Section 222 precludes Western Union from future international telegraph operations. Unfortunately, however, WUI's discussion of that case is misleading. For example, the court at 582 states

> "Petitioners argue that the opportunities given to these two companies were meant to be left open for all other comers into new areas where they were not interested in 1942. It is ridiculous to suppose that the Formula contemplated strict surveillance of contemporary competition without also intending to limit the dangers of Western Union Cables expansion in the future. The provision for equalization of traffic through corrective distribution of unrouted messages was the heart of the Formula and its application would be seriously undercut by acceptance of petitioners' tactics as legitimate." (Emphasis added)

However, WUI in paragraph 42 of its pleading states

> "Such a contention that Congress intended 'strict surveillance of contemporary competition without also intending to limit the danger of Western Union . . . expansion in the future', is utterly without support in the legislative history and has been judicially rejected. Western Union Telegraph Company v. United States, 217 F. 2d 579, 582 (2d Cir. 1954)." (Emphasis added)

Among other things, WUI's shift from the "Formula contemplated" (which was adopted and approved by the Commission and not Congress) to "Congress intended" is certainly a big step. Thus, to say the least, that case does not stand for what WUI would have us believe it does.

The only other court case which WUI cites (par. 28) for an interpretation of Section 222 is Western Union Telegraph Company v. United States, 267 F. 2d 715 (2d Cir. 1959). However, that case deals with how and when Western Union is to divest itself of its international telegraph operations under the divestment provision of Section 222. The case does not appear to have any bearing as to whether Section 222 precludes the Commission from authorizing Western Union to provide any international telegraph operations after the divestiture is completed.

WUI also cites several Commission decisions for support of its position. However, outside of Telegraph Service With Hawaii, 28 FCC 599 (1960), the decisions cited are of dubious support for WUI's position. Thus, at paragraph 14, WUI quotes from a dissenting opinion of a Commission decision (without indicating that it is a dissenting opinion) and at paragraph 31, WUI cites a Commission decision not for a Commission finding but for a characterization of a Western Union pleading.

With respect to the Hawaii case, Western Union in its petition candidly admitted that the Commission made several statements pertaining to its interpretation of Section 222 which are unfavorable to Western Union's position. We did,

however, point out that the case was decided before divestiture was carried out, and thus, at a time when the divestment provision still was effective. Consequently, Western Union did not advocate in that case, as it does herein, that it should be allowed to engage in international telegraph operations. Indeed, in the Hawaii case, the Commission characterized Western Union's position in the following manner:

> "2. As we stated in our notice of inquiry, Western Union, which presently conducts both domestic and international telegraph operations, as those terms are defined in section 222, had informally indicated that it wished to apply for authority to provide telegraph service with Hawaii after it became a State. The company, however, would want to institute such service only if it were a domestic telegraph operation under section 222, because such section requires that Western Union divest itself of its international telegraph operations.fn/ The company is not interested in developing a service which it could not retain." (28 FCC at 599; footnote omitted; emphasis added)

Unfortunately, however, here again WUI's discussion of a case is misleading. Thus, the Commission at 606 states

> "Further, Western Union argues that statutes are not static but have prospective application, and that changing factual situations cause matters previously not affected by an existing statute to be affected thereby. It is unreasonable, it therefore states, to conclude that Congress meant forever to bar Hawaii from receiving domestic service and to prevent this Commission from permitting or requiring Western Union to provide such service even though we believe it to be in the public interest." (28 FCC at 606; emphasis added)

In contrast, WUI referring to the same passage in paragraph 34, states

> "WUTelCo argued in that case that statutes are not static but have prospective application and that emerging factual situations, not in existence at the time Section 222 was enacted, may thereby affected. WUTelCo contended that it was therefore unreasonable to conclude that Congress meant forever to bar WUTelCo from providing service to Hawaii and to prevent the Commission from authorizing WUTelCo to provide such service to Hawaii if found to be in the public interest." (Emphasis added)

Thus, the Commission characterized Western Union's position as contending that in view of Hawaii's recent admission as a state, Western Union should be allowed to provide service to Hawaii as a domestic telegraph operation -- which would not be precluded by Section 222 under any interpretation of that statute. WUI, on the other hand, leaves out the key word "domestic" so that it appears that Western Union was contending that it should be allowed to provide an international telegraph operation to Hawaii (such a conclusion logically follows since under Section 222 Hawaii is an international point). Consequently, contrary to what WUI implies by innuendo, the legal issue involved in the instant proceeding was not focused on in the Hawaii case. Indeed, as we previously indicated, to the best of our knowledge, this is the first case where arguments have been focused on the issue of whether Section 222 eternally precludes the Commission from authorizing Western Union to provide any international telegraph service.

VI. Western Union Does Not Have A Domestic Telegraph Monopoly.

While both RCA Globcom and WUI speak of Western Union having acquired a domestic telegraph monopoly as a result

of the enactment of Section 222, neither carrier indicates that Congress thereby intended to restrict the Commission's authority by precluding it from authorizing any new carrier to provide domestic telegraph operations in competition with Western Union. Yet this would be a logical corollary if Congress intended to restrict the Commission's authority to authorize Western Union to provide any international telegraph operations.

Indeed, even RCA Globcom has implicitly conceded that Section 222 may no longer preclude Western Union from engaging in international telegraph operations. Thus, RCA Globcom states that "we submit that the absence of any specific proviso indicates the clear intention that the prohibition continue at least as long as Western Union's monopoly in the domestic telegraph business." (Par. 7) However, clearly Western Union no longer has a monopoly in providing domestic telegraph operations. Thus, the Commission in Docket 18920 has opened up the domestic telegraph field to new entrants despite stating that "a fairly large percentage of Western Union's service may be vulnerable to competition" from those new entrants (Specialized Common Carrier Decision, FCC 71-547, released June 3, 1971, par. 84). Consequently, even assuming Congress intended for Western Union to be precluded from international telegraph operations as long as it had a monopoly in the provision of domestic telegraph services, Western Union should now no longer be excluded from that field.

VII. Prior Positions of Western Union.

WUI devotes a number of pages of its pleading to citing excerpts from various Western Union statements (contained mostly in pleadings) made either before the divestiture was carried out in unsuccessful attempts to get the divestment provision eliminated,[/] or made after the divestiture was carried out in attempts to prevent the international carriers from continuing their step-by-step encroachment into Western Union's traditional markets. WUI's purpose is to show that Western Union in the past has taken positions with respect to the meaning of Section 222 which are at odds with its position set forth in this proceeding. However, prior positions of Western Union (which appear to have been unsupported as compared to the present proceeding where Western Union has presented compelling support for its viewpoint) are hardly determinative of the purely legal issue involved herein. In this connection, we note that the courts show little patience for that type of argument WUI now makes. Thus, for example, when Western Union many years ago made that same type of argument, the court offhandedly dismissed it stating

> "Petitioners urge that their reading of the Formula must be correct because it has been advocated in the past by several of the carriers here involved as intervenors. Even if true, such past actions would be no more persuasive than Western Union's own position to the

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[/] It is doubtful whether any of those statements were designed to relate to a situation which would exist after the divestiture occurred and thus after the mandate of Section 222(c)(2) had been carried out.

contrary [in prior years] . . ." (Western Union Telegraph Co. v. U.S., 217 F.2d 579, 582 (2nd Cir. 1954). _/

VIII. The Divestment Agreement.

WUI apparently realizing the infirmities as to its legal position on Section 222 devotes a portion of its pleading to matters which have no relevance at all to the legal issue involved herein. Thus, at the outset of its pleading, WUI emotionally argues (par. 4) that its "very birthright" is being challenged by Western Union. In this connection, WUI refers to a provision in the agreement providing for the sale of the international telegraph facilities of Western Union to American Securities Corporation (the parent company of WUI) that states that Western Union will not compete with the "Cable System" in international telegraph operations.

To begin with, we note that the argument to which WUI refers has absolutely no relevance to the Section 222 legal issue involved herein. We also note that it appears that even at the time of the divestment WUI's parent company surely must

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_/ Indeed, even the views of the members of a subsequent Congress are not considered significant for the purpose of construing past legislation. Thus, the Supreme Court in United States v. Wise, 370 U.S. 405 (1962), citing numerous prior Supreme Court cases, stated "How members of the 1914 Congress may have interpreted the 1890 Act is not of weight for the purpose of construing the Sherman Act." (370 U.S. at 414). See also Haines v. United States, 390 U.S. 85 (1968), where the Supreme Court stated that "The views of a subsequent Congress of course provide no controlling basis from which to infer the purpose of an earlier Congress." (390 U.S. at 725, fn. 4; emphasis added).

have had substantial doubts as to whether after Western Union divested itself of its international telegraph operations, it was precluded from ever again providing an international telegraph operation. Otherwise, American Securities Corporation would not have insisted on the provision to which WUI refers. In addition, it is hard to imagine how an authorization by the Commission to Western Union to provide Mailgram service between Hawaii and the Mainland would challenge WUI's "very birthright". This is especially so since Western Union would not be able to provide any other international telegraph operations unless it applied for authority to provide such an operation pursuant to Section 214 and the Commission approved such an application as being required by the public convenience and necessity. The Commission has protected WUI's vital interests in the past and there is no reason to assume that it would not do so in the future.

With respect to the provision that states that Western Union will not compete with the "Cable System", we note that the Cable System is defined in another provision of the same agreement as being basically the facilities used by Western Union in its international telegraph operations. That provision does not provide that Western Union will not compete with WUI (or American Securities Corporation) but only provides that Western Union will not compete with the "facilities" it sold to American Securities Corporation. Western Union's proposed

Hawaii Mailgram service will not compete with the "facilities" it sold to American Securities Corporation and thus will not violate the provision referred to by WUI. While Western Union believes that there are additional persuasive reasons why the provision referred to by WUI does not preclude its proposed Hawaii Mailgram service, it does not believe that it would be appropriate to discuss those reasons at this time since such a discussion would not be relevant to the resolution of the Section 222 issue involved herein.

IX. In Any Event, Section 222 Cannot Be Construed To Preclude The Commission from Authorizing Western Union To Provide New Types Of International Telegraph Operations, Such As International Mailgram Service.

Western Union in its petition explained that irrespective of how broadly the divestment provision of Section 222 is interpreted, that provision cannot be interpreted as precluding the Commission from authorizing Western Union to provide new types of international telegraph operations, such as an international Mailgram Service, which Western Union did not provide at the time Section 222 was enacted (or when the divestiture was carried out). This is because the divestment provision provides that Western Union divest itself of its international telegraph operations "theretofore carried on", and "theretofore" should be accorded some significance.

WUI does not suggest any alternative meaning for the phrase "theretofore carried on" but contends that Western

Union has incorrectly singled out several isolated words (par. 73). In support of its position, WUI cites several cases. However, the cases cited by WUI hardly show any disposition by the courts not to give significance to every single word or phrase in a statute. Thus, in illustration (1) by WUI in the two sentences following the language which WUI quotes, the Supreme Court states: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation." (310 U.S. 534, 543). In illustration (3) the language quoted by WUI appears to be designed to help the Supreme Court "determine the reach of the words 'law of the place'". (369 U.S. 10). The Court poses the question as follows: "Do they [the words 'law of the place'] embrace the whole law of the place where the negligence occurred, or only the internal law of the place?" (369 U.S. 10). In illustration (5) the language quoted by WUI appeared in the Court's discussion of whether the United States is a resident within the meaning of the words "residents, corporate or otherwise". Thus, the courts, as even evidenced in the cases cited by WUI, endeavor to give significance to every single word or phrase in a statute. Since Mailgram service is not the type of operation "theretofore carried on", Section 222 cannot properly be construed as precluding the provision of international Mailgram service by Western Union.

WHEREFORE, Western Union respectfully requests that the Commission review and reverse the Bureau's interpretation of Section 222 and direct the Bureau to accept its Hawaii Mailgram application for consideration on its merits.

Respectfully submitted,

THE WESTERN UNION TELEGRAPH COMPANY

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Jack Werner

_____
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July 25, 1972

(EXCERPT FROM A 1954 WESTERN UNION PLEADING
REFERRED TO BY WUI IN PARAGRAPH 68 OF ITS PLEADING)

3.

Divestment Other Than by Sale to Communications or Non-Communications Entities

Paragraph (iii) of Issue A inquires into the plan, or plans, if any, which Western Union has to effect divestment of its international telegraph operations, *other than by sale,* to communications or non-communications entities. This issue inquires into the possibility of divestment by means of the separate corporate technique which was the subject of much testimony during the hearings.

We shall not at this point discuss the question of the Commission's power to prescribe divestment by such

means (that question is raised by Issue C of the Commissioner's Order), but shall limit ourselves for the present to demonstrating that Western Union's failure to avail itself of divestment by such means has not constituted in the past, or will constitute in the future, a failure to exercise due diligence.

Initially, it must be recognized that Anglo has been advised of such proposal and has stated that it would not be disposed to give serious consideration to it (See p. 23 hereinbelow).

Entirely apart from the impossibility of securing Anglo's approval to divestment by such means, we think it clear that the only reasonable interpretation that can be placed on the statute is that it contemplates a *sale* of the cables. If Section 222(c)(2) did not contemplate a sale, its language could hardly be more inapt.

In RCAC Exhibit 8, there are six methods suggested by which Western Union could effect divestment of its international operations. Method (1) suggests private sale which, as has been established herein, has not proved feasible, although this method has been, is, and will be pursued by Western Union as the only method which is contemplated by Section 222(c)(2). Method (2) suggests public sale, which of course contemplates auctioning off the cables, and is so contrary to the legislative intent as to be not worthy of serious comment. Methods (3), (4), (5) and (6) are also contrary to the legislative intent, but, since they were advanced for the first time during the proceedings herein as methods by which Western Union could have effected divestment, we shall discuss them briefly.

These methods contemplate, (3) a sale to the present Western Union Stockholders, (4) the spin-off, (5) the split-off or (6) the split-up. All four methods are essentially the same in that they involve only internal, intra-

company adjustments and segregations of assets and liabilities.

If Section 222(c)(2) contemplated divestment by such methods the conditions contained therein become meaningless.[3] As we have established through its legislative history, hereinabove, the word "value" is a term of art having special connotations. If divestment by means of methods (3), (4), (5) and (6) were within the purview of the divestment requirement contained in Section 222 (c)(2) of the Act, there would have been no need to mention "value" or "consideration"; or of requiring that this Commission make a finding that the "consideration" is "commensurate" with "value". As was admitted by the RCAC witness, through whom RCAC Exhibit S was introduced, "Under methods 4, 5 and 6 the question of value never comes up at all" (Record, p. 1598). This is also true of method (3) (Record, pp. 2058-2059). It seems obvious that methods under which the question of value "never comes up at all" are inconsistent with the statutory requirement which calls for a determination of value; and makes a part of Section 222(c)(2) meaningless.

Additional support for Western Union's position that the Act requires a "sale" is to be found in the Commission's Report in the merger proceeding, 10 F.C.C. 148, where it is stated at page 153:

> "Although the merged company should divest itself of its international telegraph operations at an early date, care must be exercised to prevent an improvident divestment. The statute requires that Western Union shall receive a fair *price* for its cables, and the public interest demands that

[3] As will be established in our discussion of Issue C hereinbelow, the original Bill (S. 2445) contained a much more severe requirement for divestment, and gave no recognition to the possible existence of legal impediments to divestment; nor did it grant any protection to the carrier with respect to price.

> the *purchaser* of such cables be in a position to put them to the most effective use in the public service. The field of qualified purchasers for an international cable system is extremely limited." (Emphasis supplied)

Here we have a direct reference to a "purchaser" and a "price". You can have neither unless you have a "sale". Again the fallacy of methods (3), (4), (5) and (6) (RCAC Exhibit S) becomes apparent; since those methods involve neither a "purchaser" nor a "price". Additionally, the question of "qualified purchasers" to put the cables "to the most effective use in the public interest" would not arise; and Commission approval of divestment by any of the suggested methods would make of it nothing more than a rubber stamp.

The methods suggested by RCAC are not new and have been known for many years. Had Congress intended that they be employed it would have been a simple matter for it so to provide. Indeed, the original Bill S. 2445 contained an *absolute* requirement for divestment by Commission direction, but without the necessity of securing Commission approval. Had that Bill been finally enacted we readily concede that it would have required consideration of the methods contained in RCAC Exhibit S. However, it is clear that Congress did not seek to punish Western Union for its merger with Postal. This is the fundamental difference between directed divestments under the Anti-trust laws and the Public Utility Company Holding Act and the divestment requirement in the Communication's Act. On the contrary, the only meaning which can be attached to "commensurate with its value" is that Congress intended that Western Union Cables be sold at a price which would leave Western Union "whole" with respect to all of the benefits which ownership of the cables now confers upon Western Union.

(LETTER FROM SENATOR McFARLAND)

March 30, 1959

Dear Ken:

I have been waiting to hear from you in regard to a copy of Mr. Marshall's suggested remarks before the Committee, and the copy of the transcript which you were going to send me. But I have decided it probably would be better for me to write you my thoughts in regard to the hearing and a few things that I think it would be worthwhile for Mr. Marshall to cover in his statement. I shall outline them now, and give more details and document them if he so desires.

First, I think it would be well for Mr. Marshall to outline briefly the reasons for the domestic merger, emphasizing what I said to you - that it was pretty much a "shotgun wedding" - that Western Union had had no choice other than to merge and accept the legislation, or go into competition with the federal government - that Western Union was sound financially, and getting along all right as it was, and would have preferred to continue on this basis rather than to merge with the many restrictions that were imposed by Congress had the alternative not been competition with the government.

Second, the divestment clause was placed in the legislation when the bill provided for merger in both the domestic and international fields, calling attention to the fact that the original bill, S.2045, upon which hearings were held, also provided for a voluntary merger in the international field, separating the domestic from the international - that this was the policy as enunciated by both the Senate and House Committees at that time - that when the Committee gave consideration to this matter it reported a clean bill under the number S. 2598 eliminating merger in the international field because the then Secretary Knox stated that because we were involved in a war the Navy did not want to give consideration to this legislation at that time. This bill was passed in the Senate, but the House failed to act before adjournment. As a result, a new bill in the next Congress, S. 158, was introduced by Senators McFarland and White, identical with S. 2598, except for a clarifying amendment. It will be noted from the testimony at the hearings on this bill, and from the report, that this legislation was desirable for the following reasons:

1. Postal was going under, having borrowed some nine million dollars from the RFC. They were losing approximately $300,000 a month. Postal, without this subsidy, would have to go into bankruptcy.

2. The second alternative was that the government would have to operate Postal in order to protect its investment. To avoid this it was necessary to bring about a merger.

It will also be noted from the hearings that Western Union was operating at a profit at the time. The additional argument which was set forth in the report of the Senate was that the government needed the duplicate facilities - that is, equipment and the copper in the wires for war purposes. This had been testified to by General Stoner, representing Army communications (See p. 6 of Report No. 1490, on S. 2598, June 16, 1942). Under those circumstances Western Union had little alternative other than to merge with Postal.

It will also be noted that S. 153, as reported by the House, contained both provisions for merger in the international field and eliminated the divestment clause. The history of this bill and the committee hearings afterwards in 1945, plus the continued work on this subject by the Interstate Commerce Committee, clearly show that it was the intent of the committee to provide international legislation as soon as the war was over, and that Western Union could then dispose of its domestic lines, either to one of the international carriers, or to a combined merged company.

Steps were taken by the Committee, and hearings were held leading in this direction, which were halted by a surprise adverse report of the State Department. So Western Union now comes before the Committee supporting this legislation principally for two reasons. First, because of the divestment provision in the bill, after merger, it had been practically compelled to merge with Postal and accept this provision, otherwise it might have had to go into competition with the government; and, second, refusal to merge with Postal would have been going against War Department testimony that it was in the interest of the war effort.

I emphasize that Western Union was not given an opportunity to present its view in regard to the effect of the divestment clause without the international merger before a Senate Committee after the international merger provisions were eliminated; and that the House, probably largely because of the presentation of Western Union, eliminated the divestment features even in a bill containing voluntary merger in the international field. Western Union has not to date been able to find a buyer for its international telegraph operations at a price commensurate with its value, nor has it been able to get a release from its obligations with the British Company. Western Union believes that if there were merger legislation, either one of the companies would buy its international telegraph operations at a price commensurate with its value, or that there would be a merged company which would buy these operations at such a price. Also it is possible that this merged company would be sufficiently strong financially that the British Company would be willing to accept an assignment without obligations to Western Union. Also, attention should be called to the fact that it would be unfair to Western Union to assign or sell its international operations to a weak company with a guarantee to the British Company of its responsibi-

lities in regard to these leased lines. This would greatly weaken the domestic company. It would also be unfair to the domestic users in the United States.

Third, Western Union supports the legislation for the reasons stated by Chairman John Doerfer, giving the same briefly; also pointing out that Western Union had been unable to finance the laying of new cables because of the divestment provisions of the consolidated company.

I do not believe that I need to point out that this statement should contain a brief reason, without apology, for the change in its operations since the merger, caused by the Child Labor Law, also by the expansion of the telephone service into small towns and rural areas not previously served as well as the quick service to these areas by air mail.

Mr. Marshall himself, of course, understands this better than any one. I have not documented these hearings, because I do not know just how far or how much you desire I go. I have copies of all of the hearings, comparative prints, and reports from the date of the investigation for merger legislation in 1939 up to and including the year 1952. As you will recall, Mr. Waters did not have some of these reports and hearings, and I do not know whether Mr. Marshall has them in his office. I do not know whether they would be considered desirable or helpful. They are, of course, on file with the Committee.

Probably a mere mention that this matter has been under thorough study, calling attention to the investigations and the dates, will be sufficient to show that at least a great many members of the Committee thought merger legislation would be provided immediately after the war, and that an attempt was made to provide such legislation at that time in order to preserve the fine communications which had been set up and which was referred to in the testimony at the hearings recently. Joe Redman is thoroughly familiar with this, and is there handy where he can give you a complete outline of what was recommended. I do not think that a detailed statement in this regard should be made, but I do recommend that a reference be made to all studies and reports, giving dates of same to show that Western Union has been kept apprised of what was going on.

As stated before, there are many statements - both at the hearings and made on the floor of the Senate - that I can document for you if you think these general references are not sufficient. I am enclosing a chronological history of this merger legislation. I particularly call attention to the report I submitted on this subject which points up the predicament of Western Union, and makes the recommendations that either the divestment provisions be eliminated or merger legislation be enacted. Of course, my name can be excluded from the reference to the report of the Committee, which shows that the members of the Committee had recognized that something should be done on account of the divestment clause. I feel that it would be valuable to call attention to this report in view of Mike Monroney's

statements indicating that this was a move from the companies. I think it well to emphasize that the Committee itself has given more consideration to this subject than all others combined. Members of the Committee have indicated many times that it was in the public interest to have a definite communications policy, both during times of peace and for national defense.

These are only suggestions made for what they are worth. Mr. Marshall, you and the others are, of course, keeping in close touch with this situation, and have undoubtedly conversed with those handling the legislation and know better the steps which were taken to bring it about.

I hope you will pardon me for this long letter. I am merely trying to be helpful.

With kindest regards, I remain

Sincerely yours,

Ernest W. McFarland

Mr. K. W. Peberton, Vice-President
The Western Union Telegraph Co.
Pennsylvania Building
425 - 13th Street, N.W.
Washington 4, D. C.

CC Walter Marshall, with original of Historical Data Statement

P.S. I am enclosing my copy of my report, No. 19 of the 80th Cong., 1st Session, which you may consider to be very important in your presentation. I am sure that you have facilities for making a copy and I would appreciate the return of the original, or a copy, after this is done. EWM.

2d P.S. Since dictating the above, I have decided to enclose a second report, No. 1490, on S. 2598, dated June 16, 1942, in case you don't have it, and risk your losing it! EWM

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of July, 1972, sent by first class United States mail, postage prepaid, a copy of the foregoing "Reply of Western Union to Oppositions for Application for Review" to the following:

Bernard Strassburg, Esq.
Chief, Common Carrier Bureau
Federal Communications Commission
Washington, D. C. 20554
(Hand Delivery)

Abbott C. Roseman, Esq.
Chief, International & Satellite Communications Division
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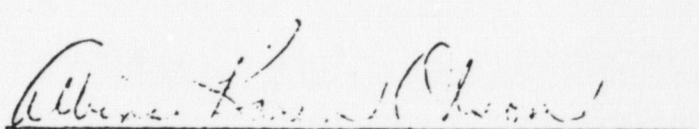
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Albina Karen Olson

A250

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)
	)
THE WESTERN UNION TELEGRAPH COMPANY	)
	)
Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Lease and to Operate Facilities to Extend Mailgram Service Between the United States Mainland and Hawaii.	)

To: The Commission

REPLY COMMENTS OF WESTERN UNION INTERNATIONAL, INC.

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Attorneys

August 11, 1972

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Before the
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Washington, D. C. 20554

In the Matter of	)
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Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Lease and to Operate Facilities to Extend Mailgram Service Between the United States Mainland and Hawaii.	)
	)
To: The Commission	)

REPLY COMMENTS OF WESTERN UNION INTERNATIONAL, INC.

Western Union International, Inc. (WUI) hereby replies to the pleading filed by The Western Union Telegraph Company (WUTelCo) dated July 25, 1972 (Pleading) in connection with WUTelCo's application for review of the Common Carrier Bureau's decision of April 19, 1972 which determined that Section 222 of the Communications Act bars WUTelCo from providing international mailgram service. In support of this reply, WUI states the following:

1. A major difference between the divergent interpretations by WUI and WUTelCo of Section 222 is: WUTelCo mistakenly claims the section is dead whereas WUI has demonstrated that it is very much alive and operable. Not only does Section 222 continue to bar WUTelCo

from international operations, but it also was recently invoked in the bestowal upon WUTelCo of the benefit of its TWX acquisition from AT&T and continues to shield WUTelCo from the antitrust laws which would otherwise prevent a domestic telex/TWX monopoly. Moreover, Section 222 would permit WUTelCo to acquire AT&T's domestic private line services. Accordingly, the merger/acquisition/divestment provisions of Section 222 continue in effect unless or until modified by the Congress.

2. WUI's petition to dismiss or deny WUTelCo's application for review, dated June 26, 1972 (Petition), demonstrated at considerable length the clear statutory inhibitions which serve to prohibit absolutely WUTelCo's provision of international mailgram service to Hawaii. In this respect, WUI believes that its petition sufficiently disposes of the arguments contained in WUTelCo's application for review and which are essentially repeated in its instant pleading. No purpose will be served by burdening the Commission with a lengthy reargument of the dubious merits of WUTelCo's position. In view of the importance of this proceeding, however, WUI believes that a brief response to WUTelCo's pleading is necessary in order to place into proper perspective the ingenuous arguments

advanced therein and respond to certain new matter.

3. WUTelCo repeats the logic-straining proposition that Congress intended Section 222 to have a limited and temporary effect. Nothing in WUTelCo's instant pleading serves to cure the glaring anomaly in its tortuous and erroneous argument that on the day following the consummation of divestment, WUTelCo would have been free to resume international operations because the divestment portion of the merger statute would then have been "executed" and of "no further effect." (Pleading, p. 6). To the contrary, an exhaustive analysis of the legislative history of this section clearly evidences an opposite result. As delineated in WUI's Petition, a reasoned analysis of the merger statute discloses a Congressional intent to require the domestic telegraph monopoly to withdraw completely from international operations. If Congress had intended to endow the Commission with the requisite power to permit WUTelCo's resumption of international service operations -- if found to be in the public interest -- it would have been a simple matter to create that authority by the express embodiment of the very language which WUTelCo now seeks to superimpose upon Section 222, i.e., that proscription of international operations by WUTelCo would not obtain if "the Commission [found] that such an operation was required by the public

convenience and necessity pursuant to Section 214 of the Communications Act." (Pleading, p. 13).

4. Not a shred of evidence is found in the legislative history and various judicial and Commission decisions relating to divestment which is supportive of WUTelCo's theory of the merger statute. On the contrary, as pointed out in WUI's petition, all of the legislative and decisional commentary pertaining to Section 222 evinces a clear understanding that, subsequent to merger and divestment, the merged carrier could not engage in international operations. It must be emphasized that unlike WUI, WUTelCo cites no relevant statements, analyses or commentaries contemporaneous with the enactment of the statute as authority for its interpretation of Section 222. Rather, WUTelCo relies upon tenuous analogies to antitrust decrees and self-serving interpretative attempts aimed at circumventing the manifest prohibitions of the merger statute.

5. WUTelCo contends that it would have been superfluous for Congress to have provided in subsection (b)(1) of Section 222 that the merged domestic carrier cannot merge or consolidate with an international carrier if it is otherwise barred from international operations.

However, WUTelCo's deceptive approach of isolating various provisions of Section 222 does not comport with well-established methods of determining legislative intent and objectives through the examination of statutory provisions as an integrated whole. In this respect, subsection (b)(1) and portions thereof are but parts of an overall legislative scheme which, when considered with the other interrelated parts of Section 222, comprehensively and undeniably prohibit WUTelCo from engaging in international operations. This comprehensive effect is reflected in subsection (b)(1) which aims to foreclose the possibility that through corporate metamorphosis, resulting from consolidation or merger, a domestic entity would be able to circumvent the statutory prohibitions. The legislative history and the comprehensive scheme of Section 222 clearly demonstrate that Congress has forbidden WUTelCo from reentering the international sphere either by internal expansion or external consolidation.

6. In considering the judicial antitrust decree cases upon which WUTelCo heavily relies, it must be emphasized that it is the courts which have fashioned such decrees and to which appeals for relief must be directed and not the administrative agencies which may coincidentally regulate the affected businesses. More particularly, in enacting

Section 222, Congress has reserved to itself the exclusive power to eliminate or amend the statutory inhibitions imposed upon the merged carrier. (Petition, pp. 24 - 30). The Commission has expressly affirmed the view that any relief from the restrictions of Section 222 must come from Congress and not the Commission. Telegraph Service With Hawaii, 28 F.C.C. 599, 605 (1960).

7. WUTelCo, in its renewed attempt to overturn settled Commission interpretation of the merger statute, does not offer any authority which evidences a Congressional delegation of power which would enable the Commission to permit WUTelCo's expansion into the international communications sphere. Rather, this power has been exclusively retained by Congress.

8. The merger statute is an express legislative exemption from the effects of the anti-trust laws and, consequently, any modification of this exemption must come from Congress. Accordingly, WUTelCo's wistful appeal that "logic" supports its present position is not a viable substitute for specific and unambiguous expression of Congressional delegation of authority.

9. WUTelCo's lengthy exposition of its alleged "shotgun wedding" to the Postal Telegraph Company is deceptively couched. When the merger legislation was first proposed, the then President of WUTelCo testified in favor of domestic consolidation, and

> "...pointed out that Western Union built up its present Nation-wide service through the consolidation of 538 smaller telegraph companies many years ago. He questioned the wisdom of law which permits telephone companies to consolidate but withholds that privilege from telegraph carriers...". Report of the Senate Committee on Interstate Commerce, S. Rep. No. 769, 77th Cong. 1st Sess. 7 - 8 (1941) (Cited hereinafter as S. Rep. No. 769).

10. WUTelCo's letter, dated March 30, 1959, attached to its pleading, Appendix B, page 1, is misleading. Although purporting to be a letter from a United States Senator, the letterhead is conveniently omitted, and the letter is not from a United States Senator. The author of the letter, Ernest W. McFarland, had left the United States Senate in 1953 and although his subsequent private activites apparently included lobbying efforts on behalf of WUTelCo, an examination of the historical record shows that the letter, written 16 years after passage of Section 222, is misleading.

11. Although the 1959 letter states that at the time of merger WUTelCo "was sound financially, and getting along all right as it was...", WUTelCo itself has noted that its

> "...revenues declined substantially in the depression years of the 1930's. Between 1930 and 1940, gross operating revenues receded to levels running between eighty and one hundred millions, considerably below the levels of the previous decade. Operations were conducted at deficits or small profit. Employment receded from 76,121 shown for 1930 to only 42,729 at the beginning of 1940." Western Union Telegraph Company, Statement to the President's Communications Policy Board Concerning Domestic Record Communications Policies, p.6 (November 17, 1950) (Cited hereinafter as Statement).

12. The Senate Committee on Interstate Commerce, which conducted the 1939 - 1941 "Study of the Telegraph Industry" concluded that "Western Union, under present and clearly forseeable competitive, economic and financial conditions is not likely to remain as a sound communications carrier, operating in the general public interest." S. Rep. No. 769, p.20. The alleviation of WUTelCo's financial difficulties was one of the reasons advanced in support of the merger legislation. S. Rep. No. 769, p.17. It was fully recognized at this time that the elimination of competition between Western Union and Postal Telegraph would be required to restore the domestic telegraph industry to economic health. Ibid., p. 8; H.R. Rep. No. 2664, 77th Cong., 2d Sess. 3 (1942).

13. In approving the formal WUTelCo/Postal Telegraph merger application, the Commission noted that "while [Western Union's] financial position has been improved by reason of abnormally large volumes of wartime telegraph traffic, the return of normal conditions may again result in operating losses with a duplicate system in the domestic telegraph industry." Application for Merger, 10 F.C.C. 148, 163 (1943).

14. At the time of merger, WUTelCo did not consider its acquisition of a major competitor to be a burden, but rather estimated that the integration of the Postal Telegraph system with its own would add an estimated annual net income of $4,259,000 to the merged company. Ibid., p. 159. Additionally, WUTelCo estimated

> "that as a direct result of the merger the ultimate saving in its expenses, such as the saving in operator's school expenses, competitive practices, and overtime pay would, on an annual basis, amount to $2,700,000." Ibid.

15. WUTelCo itself has characterized the merger, in which it "acquired additional revenues of $22,000,000 per annum, 31,300 miles of Postal pole lines and 334,000 miles of wire", as

> "a necessary first step in the elimination of destructive competition and duplicating facilities. It was a necessary step in the national interest as well as in the interests of conserving the equities of the employees and stockholders of both companies...". Statement, pp. 8 - 9.

16. In addition to the elimination of service competition between Postal Telegraph and WUTelCo, the merger also ended the competitive rate structure which had obtained. WUTelCo petitioned for and obtained two consecutive rate increases upon the heels of merger (11 F.C.C. 283, 829 (1946)) as well as the elimination of the statutory requirement of a special discount government telegraph rate. Act of July 16, 1947, Pub. L. No. 193, 61 Stat. 327.

17. Furthermore, the merger legislation contained the statutory authority -- Section 222(b)(1) -- for WUTelCo's future acquisition of the Bell System's TWX network which had been a major competitive problem for WUTelCo. S. Rep. 769, pp. 17-18; Statement, pp. 11-12. Acquisition of the TWX network was considered to be an integral part of the overall legislative scheme to afford WUTelCo domestically with "a complete telegraph monopoly." Hearings on S. 2598 Before a Subcomm. of the House Comm. on Interstate Commerce, 77th Cong. 2d Sess. 28 (1942) (Cited hereinafter as Hearings). The massive benefits received by WUTelCo as a result of the 1943 legislation were eagerly solicited, happily accepted, and are ongoing in nature. Section 222 lives on and did not die with divestment as WUTelCo contends.

18. WUTelCo's assertions of its "forced" acquisition of Postal Telegraph Company cannot obfuscate the essential fact that WUTelCo's efforts failed to remove or alter the merger statute's absolute and continuing restriction with respect to international operations. Indeed, although WUTelCo's president made extensive comments and suggestions during the legislative hearings, concerning other portions of the statute, no objection was

voiced to the understood principle that under the statute, WUTelCo was "to be barred ultimately from the international field." Hearings, p. 71. In any event, WUTelCo was clearly free to acquire or not acquire the Postal Telegraph Company as it saw fit. Accordingly, in voluntarily acquiring its competitor, WUTelCo reaped the valuable advantages resulting from domestic monopoly. Therefore, WUTelCo cannot now be heard to complain about statutory proscriptions imposed as a condition of merger.

19. The Commission's declaratory ruling in Matter of Western Union of Hawaii, Inc., 33 F.C.C. 2d 538 (1972) underscores the necessity in the present proceeding of considering the merger statute as an integrated whole, rather than distorting specific provisions in a vacuum. In its declaratory ruling, the Commission analyzed the overall Congressional objectives in enacting Section 222 and concluded that the geographical definitions of "international telegraph operations" and "domestic telegraph operations" underlie the entire legislative scheme of the merger statute. Thus, the Commission recognized that

> "service between the State of Hawaii and the mainland of North America must be considered to be an international telegraph service under the provisions of Section 222..." 33 F.C.C. 2d at 542.

The Commission noted that in order to effectuate its goals, Congress

> "...included under 'international' all service between the mainland and overseas points, regardless of whether the latter might be politically part of the United States, because the international carriers served such points." Ibid.

20. The Commission further stated that it was applying the relevant provisions of the 1960 Hawaii Omnibus Act, (47 U.S.C.A. §222(a)(10) - excluding Hawaii from the definition of continental United States for the purposes of Section 222)

> "so as to accomplish the stated Congressional purpose, i.e., maintain mainland to Hawaii telegraph service as international, while at the same time avoiding any unnecessary circumscription of the State of Hawaii's authority over its intrastate telegraph services." 33 F.C.C. 2d at 543 (emphasis added).

Consequently, contrary to WUTelCo's contentions, the declaratory ruling is fully consistent with the Commission's earlier interpretations of Section 222 and with WUI's arguments herein.

21. WUTelCo additionally argues that the restrictions contained in Section 222 apply only to "record communications as that term was defined ... in 1943." (Pleading, p. 7).

However, WUTelCo does not refer to any such 1943 definition. Indeed, there was never any need for a definition of the phrase "record communications", as Congress was neither concerned with the variations nor types of record services covered by Section 222, but rather with the geographical areas of operation within which the merged carrier may and may not operate. The Communications Act is a living document and the 1943 terminology "record communications" is broad enough to encompass subsequent services, including telex and mailgram, just as the 1934 terminology is broad enough to cover television, teleprocessing, CATV, and domestic satellites even though such technology was not in use in 1934.

22. The judicial decisions cited in WUI's Petition fully recognize the post-merger prohibition which restricts WUTelCo from engaging in international operations.* These decisions clearly support WUI's position that, whether by guise of ingenuous interpretation of the International Formula provisions or dilatory divestment of its cable system, WUTelCo cannot evade the statutory requirements of total withdrawal from international operations.

*Western Union Telegraph Company v. United States, 217 F. 2d 579 (2nd Cir. 1954); Western Union Telegraph Company v. United States, 267 F. 2d 715 (2nd Cir. 1959). These cases are discussed in WUI's Petition, pp. 12 - 14, 28 - 29.

23. WUTelCo seeks to avoid the probative effect of the relevant comments made during the Congressional committee hearings. There is no inflexible rule of statutory construction which prevents a reviewing body from analyzing all available material pertinent to the meaning of legislation. With respect to hearing testimony, in Detroit & Toledo S.L.R. Co. v. United Transp. U., 396 U.S. 142 (1969), the Supreme Court based its decision, which involved the interpretation of a provision of the Railway Labor Act, upon relevant hearing testimony. Ibid., pp. 151 n. 18, 152 n. 19, 153 n. 20.

24. Clearly, the legislative hearing testimony of the Commission members and WUTelCo's president -- uncontradicted by any other witnesses or any of the source materials comprising the legislative history of the merger statute -- must be considered as important probative evidence of statutory intent to prohibit WUTelCo from engaging in international operations.

25. WUTelCo seeks to avoid the consequences of its covenant to compete with WUI with a remarkable argument that this covenant relates only to the "facilities" sold to WUI. Pleading, p. 32. It is totally falacious for WUTelCo to argue that it only covenanted

not to compete via the obsolete, discontinued telegraph cables, but that it is free to compete with WUI via the TAT cables or the Intelsat system.

WHEREFORE, WUI respectfully requests the Commission to dismiss or deny WUTelCo's Application for Review and affirm the Common Carrier Bureau's Decision dated April 19, 1972 in all respects.

Respectfully submitted,

WESTERN UNION INTERNATIONAL, INC.

By: Robert E. Conn

Alexander D. van Eyck

Howard L. Stevens

Its Attorneys

26 Broadway
New York, New York 10004

August 11, 1972

CERTIFICATE OF SERVICE

I, Evangeline A. Hardy, hereby certify that on this 11th day of August, 1972, I mailed by United States Mail, postage prepaid, a copy of the foregoing to the following:

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Chief, Common Carrier Bureau
Federal Communications Commission
Washington, D. C. 20554

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/s/Evangeline A. Hardy
Evangeline A. Hardy

PATSY T. MINK
SECOND DISTRICT
HAWAII

COMMITTEE ON EDUCATION AND LABOR
SELECT SUBCOMMITTEE ON EDUCATION
GENERAL SUBCOMMITTEE ON EDUCATION
GENERAL SUBCOMMITTEE ON LABOR

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS
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Congress of the United States
House of Representatives
Washington, D.C. 20515

August 3, 1972

AUG 4 9 31 AM '72
DEAN BURCH
CHAIRMAN
F.C.C.

REC'D

Honorable Dean Burch
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Chairman:

I am writing in support of the application for expansion of MAILGRAM service to Hawaii that is now pending before the Federal Communications Commission.

The MAILGRAM service would be most beneficial to businesses and residents who must now rely almost entirely on telephone and other expensive means of communication from the continental United States to Hawaii and vice versa. The MAILGRAM service would be economical and also a time saver when compared to the fastest postal service available between Hawaii and the continental United States. Special delivery mail service to Hawaii usually takes two days, MAILGRAM service would reduce this to one day.

Your careful and favorable consideration of this application will be greatly appreciated.

Very truly yours,

Patsy T. Mink

PATSY T. MINK
Member of Congress

RECEIVED
AUG 4 1972
CHIEF, COMMON CARRIER BUREAU

LETTER FROM DEAN BURCH TO PATSY T. MINK DATED 8/9/72

9520

Honorable Patsy T. Mink
House of Representatives
Washington, D. C. 20515

Dear Mrs. Mink:

I have your letter of August 3, 1972, in support of the application for expansion of MAILGRAM service to Hawaii.

The Commission has under active consideration several applications for the provision of MAILGRAM or similar service (TELEPOST) to Hawaii, as well as to Puerto Rico and the U. S. Virgin Islands. Applications were filed by Western Union International, Inc. and Cable & Wireless/Western Union International, Inc. on June 16, 1972; RCA Global Communications, Inc. on June 2, 1972; and ITT World Communications Inc. on June 6, 1972. Also pending is an application for review filed by The Western Union Telegraph Company (WUT) on April 4, 1972, of the decision issued by the Chief, Common Carrier Bureau, on April 19, 1972, that Section 222 of the Communications Act precludes the Commission, as a matter of law, from granting the WUT application to extend MAILGRAM service to Hawaii.

I appreciate your interest in this matter, and a copy of your letter is being associated with the applications to provide MAILGRAM type service to Hawaii.

Sincerely,

Dean Burch
Chairman

RBCrowell:jc/isc:CC

Typed 8/9/72.

A273

PATSY T. MINK
SECOND DISTRICT
HAWAII

COMMITTEE ON EDUCATION AND LABOR
SELECT SUBCOMMITTEE ON EDUCATION
GENERAL SUBCOMMITTEE ON EDUCATION
GENERAL SUBCOMMITTEE ON LABOR

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS
SUBCOMMITTEE ON TERRITORIAL AND INSULAR AFFAIRS
SUBCOMMITTEE ON NATIONAL PARKS AND RECREATION
SUBCOMMITTEE ON INDIAN AFFAIRS

Congress of the United States
House of Representatives
Washington, D.C. 20515

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RECEIVED
OCT 20 1972
CHIEF, COMMON CARRIER BUREAU

October 17, 1972

OCT 19 2 48 PM '72
DEAN BURCH
CHAIRMAN
F.C.C.
REC'D

Honorable Dean Burch
Chairman
Federal Communications Commission
1919 M Street
Washington, D.C. 20554

Dear Mr. Chairman:

I strongly urge your positive efforts to provide "Mailgram" service to the State of Hawaii.

Currently it is available in the 48 contiguous States only. If it is offered in these States, as a basic form of communication supported by the Postal Service, it is discriminatory not to provide it in Hawaii as well.

Hawaiian Telephone Company has applied to the Commission for permission to start "Mailgram" service between Hawaii and the U.S. Mainland. Other carriers may also apply. I recommend that a carrier be permitted to provide this service as soon as possible.

It is very distressing to observe that Hawaii may be excluded again under this service, thereby compounding the communications difficulties that already exist through negligence of the Federal government to insist on adequate service. Even before the advent of "Mailgram", Hawaii was far behind, with many services available to other States not offered in Hawaii. With "Mailgram" established in 1970. the government is compounding rather than reducing this inequity.

I am advised that under the Communications Act of 1934, Hawaii is considered an international point, so that carriers with only domestic operating authority cannot provide service there. I would appreciate your providing me with a complete survey of the effects of this provision on Hawaii communications

as compared with communications in other States. It seems to me that if this Act was not effectively revised by the Hawaii Statehood Act, the Commission should seek any necessary changes in view of the fact that Hawaii is now a State and not an international territory.

Very truly yours,

Patsy T. Mink

PATSY T. MINK
Member of Congress

LETTER FROM DEAN BURCH TO PATSY T. MINK DATED 10/30/72

9520

Honorable Patsy T. Mink
House of Representatives
Washington, D. C. 20515

Dear Mrs. Mink:

I have your letter of October 17, 1972, concerning MAILGRAM-type service between the United States Mainland and the State of Hawaii.

The application of the Hawaiian Telephone Company for authority to provide a MAILGRAM-type service was recently tendered for filing. That application and an application filed by the DOMSAT Corporation are now being reviewed to determine their acceptability for filing under the Commission's Rules and Regulations. Similar applications from ITT, RCA and WUI are under active consideration. We are awaiting additional information necessary to the processing of the respective applications of the latter three companies.

MAILGRAM service on the Mainland was instituted in January 1970 on an experimental basis to selected points for a service of two years. New points were added during that period, and we were recently informed by Western Union that it was planning to offer the service on a regular basis starting January 1, 1973. However, that company has not yet submitted requisite information to support such proposal. Apparently, at the time the experimental service was instituted the U. S. Post Office did not deem it appropriate to also institute service to overseas points, including Hawaii, pending experience with the more limited service.

You refer to the Communications Act of 1934 and its limitation on the provision of services to Hawaii by domestic carriers. The relevant provision is found in Section 222 of the Communications Act which bars The Western Union Telegraph Company, as a domestic telegraph monopoly, from competing with international record carriers on overseas routes. As you are aware, there is pending before the Commission an application for review, which

has been filed by Western Union, regarding the decision issued by the Chief, Common Carrier Bureau, on April 19, 1972, that Section 222 of the Communications Act precludes the Commission from granting Western Union's application for authority to extend its MAILGRAM service to Hawaii. I cannot, of course, now comment on this matter. A final determination is forthcoming, however, and will surely include a detailed discussion of the legislative history and current application of Section 222 of the Communications Act.

Your question as to whether the Hawaii Statehood Act (1959) effectively revised Hawaii's status as an international point is answered in the 1960 enactment of an amendment to Section 222 of the Communications Act, specifically excluding Hawaii from the "continental United States" for purposes of communications service. Legislative commentary indicates that, despite its new political status, there was an interest in preserving the geographically-based classification of the State of Hawaii (1960 US Code Cong. & Adm. News 2963, 2980).

Insofar as the general question of the effect of excluding Western Union from providing service to Hawaii is concerned, you are, of course, aware that such company has a subsidiary which furnishes an intrastate telex-type service in Hawaii. The Hawaiian Telephone Company also furnishes intrastate as well as overseas services and connects with American Telephone and Telegraph Company for Mainland/Hawaii service. Both companies may offer between the Mainland and Hawaii any service which is offered by AT&T on the Mainland.

Three international record carriers also operate between the Mainland and Hawaii, providing, among other services, message telegraph and telex service, and interconnect at both Hawaii and the Mainland with domestic carriers. The international carriers have recently reduced message telegraph charges for routes outside of Honolulu to the level of Honolulu charges, and I would expect that, as facility unit costs become cheaper, charges for all services will continue to be reduced between Hawaii and the Mainland.

There is no question that Hawaii is entitled to and should receive all services available on the Mainland. The only question that we are in the process of resolving is which carrier or carriers qualify to provide the Mainland-Hawaii link for MAILGRAM-type service. I assure you that this question will be resolved at an early date.

I shall be pleased to keep you informed regarding this matter should you so desire.

Sincerely,

Dean Burch
Chairman

JLKruse:aw:jc/isc:CC

Typed 10/30/72.

A278

B- 049105

GSA FORM 43 (4 PART)
Jan. 1970
COMMUNICATIONS CONTROL SLIP

DAT 12/21

FROM
Cong. Patsy Mink

SUBJECT
Re our letter of November 1

PREPARE REPLY FOR SIGNATURE OF

RFRD ~~D. Burch~~	RFRD Gott'w	RFRD	RFRD
DATE C	DATE 1/3/73	DATE	DATE
RE ~~12x~~ 1/2	REPLY DISPATCHED	FILE DESIGNATION	
1/9 STAFF OR SERVICE MAIL		FOLLOW-UP COPY 3 RECORD COPY 4	

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JAN 2 12 03 PM '73
FEDERAL COMMUNICATIONS COMMISSION
REC'D

Honorable Dean Burch
Chairman
Federal Communications Commission
1919 M Street
Washington, D.C. 20554

Dear Mr. Chairman:

Thank you for your letter of November 1 in response to my inquiry regarding Mailgram type service between the United States mainland and Hawaii.

I appreciate your offer of keeping me informed on this matter and request that I be provided with a copy of the final determination on the application for review filed by Western Union on the Common Carrier Bureau decision of April 19, 1972. This final determination is mentioned on page 2 of your letter. I am interested in the detailed discussion of the legislative history and current application of Section 222 of the Communication Act which it may contain.

Again, many thanks for your assistance.

Very truly yours,

Patsy T. Mink

PATSY T. MINK
Member of Congress

RECEIVED
JAN 3 197
CHIEF, COMMON CARRIER BUREAU

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Western Union International, Inc., Petitioner, v. The Federal Communications Commission and The United States of America, Respondents.	Docket No. MOTION FOR LEAVE TO INTERVENE ON BEHALF OF ITT WORLD COMMUNICATIONS INC.

Upon the annexed Affidavit of Harry Schwedock and upon all papers filed and prior proceedings had herein, ITT World Communications Inc. ("ITT Worldcom") hereby moves, pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and 28 U.S.C. §2348 (1970), for leave to intervene in the above proceeding, on the grounds that ITT Worldcom is a party in interest in the proceedings before the Federal Communications Commission ("FCC") from which this appeal originated and that ITT Worldcom's interests will be affected if the FCC Order, released June 23, 1975, and annexed to the petition herein as Exhibit A, is not set aside as requested

in the Petition of Western Union International, Inc.

Dated: New York, New York
July 24, 1975

LeBoeuf, Lamb, Leiby & MacRae

By Charles P. Schaffer
A Member of the Firm

Attorneys for ITT World Communications Inc.
140 Broadway
New York, New York 10005
Tel.: (212) 269-1100

TO:

Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Attention: Litigation Section

Howard E. Shapiro, Esq.
United States Department of Justice
Washington, D.C. 20530

Stroock & Stroock & Lavan
Attorneys for Western Union
International, Inc.
61 Broadway
New York, New York 10006

Exhibit A to the Motion by ITT World Communications, Inc. for Leave to Intervene is the Memorandum Opinion and Order of the F.C.C., released June 23, 1975, reproduced herein at pages A7-60.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Western Union International, Inc., Petitioner, v. The Federal Communications Commission and The United States of America, Respondents.	Docket No. AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HARRY SCHWEDOCK, being duly sworn, deposes and says:

1. I am Vice-President and Director of Marketing of ITT World Communications Inc. ("ITT Worldcom"). I am familiar with tne actions of the Federal Communications Commission ("FCC") from which Western Union International, Inc. ("WUI") and ITT Worldcom seek relief. I make this affidavit in support of ITT Worldcom's Motion for Leave to Intervene in this Court's consideration of the Petition for Review brought by WUI.

2. ITT Worldcom is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 67 Broad Street, New York, New York 10004. ITT Worldcom is a common carrier, subject to the Communications

Act of 1934, as amended (the "Act") and, like petitioner WUI, is one of the major international record carriers in the United States.

3. This proceeding has its origin in an application of the Western Union Telegraph Company ("Western Union Domestic" or "WUD"), filed with the FCC on April 4, 1972, for authority, pursuant to Section 214 of the Act, to lease and operate facilities between the 48 mainland States and Hawaii for the purpose of extending its mailgram service to Hawaii, which the Act defines as an international point.

4. On April 13, 1972, ITT Worldcom filed with the FCC a Petition to Reject the WUD application, on the grounds that the authority requested is prohibited by Section 222 of the Act and beyond the power of the Commission, and thereby became a party in interest in the FCC's consideration of that application. A copy of ITT Worldcom's Petition to Reject is annexed hereto as Exhibit A.

5. Thereafter, on April 19, 1972, the Common Carrier Bureau (the "Bureau") of the FCC rejected WUD's application on the grounds set forth in ITT Worldcom's Petition to Reject, that Section 222 of the Act is intended to preclude WUD from providing the service requested and that the FCC had no authority to grant WUD's application. WUD sought and obtained review of this determination and on June 23, 1975, over the opposition of WUI and a third major international record carrier, RCA Global Communications, Inc. ("RCA"), the FCC reversed the Bureau and

held that Section 222 constitutes no bar to WUD's application. It is with respect to this decision that WUI has petitioned for review.

6. In addition to its participation in the initial agency proceedings, ITT Worldcom's interest and right to participate in this appeal is demonstrated by the fact that it has itself filed with the FCC an application for authority to provide Telepost Service to Hawaii, a service which is substantially identical to the mailgram service proposed by WUD. A copy of ITT Worldcom's application for such authority is annexed hereto as Exhibit B.

7. Furtner, ITT Worldcom already provides other means of record communication services between the mainland States and Hawaii. WUD's proposed mailgram service would be in direct competition with these other services as well as ITT Worldcom's Telepost Service. Thus, ITT Worldcom's interests will clearly be affected if the FCC Order of June 23, 1975 is not set aside as requested in the petition of WUI.

8. Pursuant to the terms of 28 U.S.C. §2348, ITT Worldcom, as a party in interest in the proceedings before the agency and one whose interests will be affected if the agency order appealed from herein is not enjoined, set aside or suspended, may appear as a party to this appeal of its own motion and as of right.

WHEREFORE, I respectfully request that this Court grant the Motion of ITT World Communications Inc. for leave to intervene in the above-captioned proceedings.

Harry Schwedock

Sworn to before me this
day of July, 1975.

Notary Public

Harry Schwedock

G. ANNE MACCONE
Notary Public State of New York
No. 24-4445450
Qualified in Kings County
Commission Expires March 30, 1977

Exhibit A to the Affidavit of Harry Schwedock is ITT Worldcom's Petition to Reject, reproduced herein at pages A105-8.

EXHIBIT B TO AFFIDAVIT OF HARRY SCHWEDOCK

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

T-C-2477 -C-

FCC File No.

Date JUN 8 1972

NOTICE

Notice is hereby given that an application, a copy of which is attached hereto, has been filed with the Federal Communications Commission.

You are hereby extended the opportunity to file, if you so desire, within twenty (20) days from the date hereof, a statement showing substantial cause, if any you have under the Communications Act of 1934, as amended, why this application should or should not be granted.

FEDERAL COMMUNICATIONS COMMISSION

Secretary

Attachment

21158

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
ITT WORLD COMMUNICATIONS INC.	)	
	)	
Application for such additional authority as may be required to utilize authorized facilities for, and to render, Overseas Telepost Service between United States Mainland and Hawaii-Puerto Rico-U.S. Virgin Islands, and between Hawaii and Puerto Rico-U.S. Virgin Islands.	)	FCC File No. T-C-2477

APPLICATION OF ITT WORLD COMMUNICATIONS INC.

This Application is submitted by ITT World Communications Inc. (ITT Worldcom) under Section 214 of the Communications Act of 1934, as amended, for such additional authority as may be required to:

(a) Render Overseas Telepost Service between the United States Mainland and Hawaii-Puerto Rico-U.S. Virgin Islands, and between Hawaii and Puerto Rico-U.S. Virgin Islands;

(b) Utilize for rendition of Overseas Telepost Service authorized facilities between:

United States Mainland and:
Hawaii
Puerto Rico/U.S. Virgin Islands

New York, N.Y. and:
San Francisco, Calif.
Washington, D.C.

San Juan, Puerto Rico and:
Ponce, Puerto Rico
Mayaguez, Puerto Rico

Charlotte Amalie, St. Thomas and:
Christiansted, St. Croix, U.S. Virgin Islands

ITT Worldcom submits the following information in support of this Application in accordance with Section 63.01 of the Commission's Rules and Regulations:

1. ITT Worldcom is a corporation organized and existing under the laws of the State of Delaware. It has its principal place of business at 67 Broad Street, New York, N.Y. 10004 and is wholly owned by the American Cable and Radio Corporation (AC&R). AC&R is wholly owned by U.S. Telephone and Telegraph Corporation which is in turn wholly owned by International Telephone and Telegraph Corporation.

2. Correspondence concerning this Application may be addressed to Mr. Gisto Canestrari, Vice President, ITT World Communications Inc., 67 Broad Street, New York, N.Y. 10004.

3. ITT Worldcom is a common carrier, subject to Section 214 of the Communications Act of 1934, as amended, and an authorized carrier as defined in Section 103(7) of the Communications Satellite Act of 1962.

4. The facilities covered by this Application will not be used to extend service into territory which is not now directly served by ITT Worldcom.

5. The facilities involved in this Application presently consist of circuitry between points as indicated below:

Between	No. of Voice Grade Circuits		
	Domestic	*Cable	*Satellite
U.S. Mainland and:			
Hawaii	-	8	10
Puerto Rico/U.S. Virgin Is.	-	27	11
New York, N.Y. and:			
Washington, D.C.	3	-	-
San Francisco, Calif.	17	-	-
San Juan, Puerto Rico and:			
Ponce, Puerto Rico	1	-	-
Mayaguez, Puerto Rico	1	-	-
Charlotte Amalie, St. Thomas and:			
Christiansted, St. Croix, U.S. Virgin Islands	2	-	-

*Related connecting circuitry exists between appropriate cableheads or earth stations and ITT Worldcom operating offices.

6. Request is hereby made for such additional authority as may be required to:

(a) Render Overseas Telepost Service:

between:	and:
United States Mainland	Hawaii Puerto Rico U.S. Virgin Islands
Hawaii	Puerto Rico U.S. Virgin Islands

(b) Utilize, for rendition of Overseas Telepost Service, authorized facilities:

between:	and:
*United States Mainland	*Hawaii *Puerto Rico/U.S. Virgin Islands
New York, N.Y.	San Francisco, Calif. Washington, D.C.
San Juan, Puerto Rico	Ponce, Puerto Rico Mayaguez, Puerto Rico
Charlotte Amalie, St.Thomas, U.S. Virgin Islands	Christiansted, St. Croix, U.S. Virgin Islands

*Including related connecting circuitry between appropriate cableheads or earth stations and ITT Worldcom operating offices.

7. Details of Overseas Telepost Service appear in the attached proposed ITT Worldcom Tariff F.C.C. No. 65 and in the attached correspondence exchanged between the U.S. Postal Service and ITT Worldcom. Salient features of the proposed service and of the arrangements with the U.S. Postal Service are:

(a) Subscribers of ITT Worldcom Telex Service in the United States Mainland, Hawaii, Puerto Rico and U.S. Virgin Islands, and subscribers of Puerto Rico Communications Authority Telex Service in Puerto Rico, may file a Telepost message with the appropriate ITT Worldcom operating office in a prescribed manner and format for transmission and transfer by ITT Worldcom to an overseas Post Office serving the destination point (hereafter referred to as "Serving Post Office") for mail delivery by the U.S. Postal Service to an address located in specified ZIP code areas in the United States Mainland, Hawaii, Puerto Rico or U.S. Virgin Islands, as the case may be, via the next regularly scheduled carrier trip.

(b) ITT Worldcom will furnish at its expense the necessary connecting lines from its appropriate operating offices to, and teleprinter receiving equipment (including teleprinter paper and ribbons)

and telephone service at, the respective Serving Post Offices.

(c) The U.S. Postal Service will, at its expense, furnish other required equipment and distinctive delivery envelopes for use at the Serving Post Offices. Its personnel will scan each Telepost message for possible garbling or obvious error and will inform ITT Worldcom of any undeliverable Telepost message.

(d) For reasons of competitive necessity, the proposed rates will be as follows:

(1) Service Charge - $0.35 per Telepost message, which will accrue to the U.S. Postal Service.

(2) Usage Charge - Per minute, or fraction thereof, as specified in the proposed tariff:

From:	To:	Rate
United States Mainland	Hawaii	$2.00
	Puerto Rico	2.00
	U.S. Virgin Islands	2.00
Hawaii	United States Mainland	2.00
	Puerto Rico	3.00
	U.S. Virgin Islands	3.00
Puerto Rico and U.S. Virgin Islands	United States Mainland	2.00
	Hawaii	3.00

(e) The service is experimental in nature and, at the request of the U.S. Postal Service, will operate for an initial period not to exceed 18 months.

8. ITT Worldcom does not anticipate that the offering of Overseas Telepost Service during the initial period as herein

described will require any additional circuit facilities between its operating offices or any additional operating or maintenance personnel. ITT Worldcom proposes to utilize, for rendition of Overseas Telepost Service, the equipment and derived 50 baud channels normally assigned to its International Telex Service.

9. ITT Worldcom has reached agreement with the U.S Postal Service and the Puerto Rico Communications Authority concerning Overseas Telepost Service as described in the attached correspondence exchange.

10. Inasmuch as the domestic Mailgram Service appears to have received significant acceptance by the public and the U.S Postal Service is desirous of testing a similar type service between points as herein described, it is in the public interest that such testing proceed and the results thoroughly evaluated before embarking on a more extensive or permanent service of the subject type.

11. While the proposed rates will be as mentioned in Paragraph No. 7. (d) for competitive reasons, ITT Worldcom notes that these rates, first proposed by RCA Global Communications, Inc., do not recognize the differences between the store-and-forward telex arrangements involved in the subject service and regular customer-to-customer telex services. ITT Worldcom believes that higher

costs are incurred in providing store-and-forward services. (Related questions have already been raised in connection with other store-and-forward telex services in FCC Docket No. 19256.) Nevertheless, since our competitors have priced their Telepost service offerings so as to ignore such cost differentials, we must follow suit pending Commission determinations respecting the lawfulness of the subject rates.

12. The accounting to be performed shall be in accordance with Part 34 of the Commission's Rules and Regulations.

WHEREFORE, ITT Worldcom respectfully submits that the Commission's prompt and favorable action on this Application will effectively serve the public interest and convenience.

Respectfully submitted,

ITT WORLD COMMUNICATIONS INC.

By _____

Gisto Canestrari
Vice President

Dated: May 31, 1972
New York, New York

ITT WORLD COMMUNICATIONS INC.

TARIFF F.C.C. NO. 65
ORIGINAL TITLE PAGE

OVERSEAS TELEPOST SERVICE

This tariff applies to OVERSEAS TELEPOST Service between points within the continental United States and points within Hawaii, Puerto Rico and the U.S. Virgin Islands to the extent indicated herein.

OVERSEAS TELEPOST Service is furnished by means of wire, radio, satellite, submarine cable or a combination thereof.

Issued

Effective

Earl S. Barbely, Manager, Rates and Tariffs,
67 Broad Street, New York, N.Y. 10004

ITT WORLD COMMUNICATIONS INC.

TARIFF F.C.C. NO. 65
ORIGINAL PAGE 1

CHECK SHEET

This tariff contains a Title Page and Pages 1 to 10 inclusive, each of which is effective on the date shown thereon.

Issued

Effective

Issued by:
Earl S. Barbely, Manager, Rates and Tariffs,
67 Broad Street, New York, N.Y. 10004

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Issued Effective

Issued by:
Earl S. Barbely, Manager, Rates and Tariffs,
67 Broad Street, New York, N.Y. 10004

Concurring Carriers

None

Connecting Carriers

None

Participating Carriers

None

Explanation of Symbols

(C) - to signify changed regulation.
(D) - to signify discontinued rate or regulation.
(I) - to signify increase.
(N) - to signify new rate or regulation.
(R) - to signify reduction.
(S) - to signify reissued matter.
(T) - to signify a change in text but no change in rate or regulation.

Issued

Effective

Issued by:
Earl S. Barbely, Manager, Rates and Tariffs,
67 Broad Street, New York, N.Y. 10004

3. Definitions

Company - ITT World Communications Inc.

Continental United States - the contiguous 48 states and the District of Columbia.

Customer - denotes the person who, or the firm, company, or other organization which uses the OVERSEAS TELEPOST Service under this tariff and is responsible for payment of charges as well as compliance with the Company's regulations covering such service.

Routing Number - denotes the letters ZIP and the arabic numbers required to route the OVERSEAS TELEPOST message to the Serving Post Office.

Serving Post Office - denotes a post office in the continental United States, Hawaii or Puerto Rico to which a OVERSEAS TELEPOST message may be sent for mail handling and delivery to the addressee.

OVERSEAS TELEPOST Message - denotes the message sent by a customer through the Company's facilities to a Serving Post Office for mail handling and delivery to the addressee.

U.S. Virgin Islands - the islands of St. Croix, St. John and St. Thomas.

PRCA - the Puerto Rico Communications Authority.

1. Application of Tariff

1.1 This tariff contains the regulations and rates applicable to OVERSEAS TELEPOST Service provided by the Company between points within the continental United States and points within Hawaii, Puerto Rico and the U.S. Virgin Islands; and between points within Hawaii and points within Puerto Rico and the U.S. Virgin Islands, to the extent indicated herein.

2. Description of Service

2.1 OVERSEAS TELEPOST Service provides for:

2.1.1 The transmission of messages from the continental United States to Hawaii and Puerto Rico and the transfer of said messages to specified Serving Post Offices for subsequent mail delivery by the U.S. Postal Service addressed to addressees located in specified zip code areas, in accordance with section 7. following, in Hawaii, Puerto Rico or the U.S. Virgin Islands, as the case may be.

2.1.2 The transmission of messages from Hawaii to the continental United States and Puerto Rico and the transfer of said messages to specified Serving Post Offices for subsequent mail delivery by the U.S. Postal Service addressed to addressees located in specified zip code areas, in accordance with section 7. following in the continental United States, Puerto Rico or the U.S. Virgin Islands, as the case may be.

2.1.3 The transmission of messages from Puerto Rico or the U.S. Virgin Islands to the continental United States and Hawaii and the transfer of said messages to specified Serving Post Offices for subsequent mail delivery by the U.S. Postal Service addressed to addressees located in specified zip code areas, in accordance with section 7. following, in the continental United States or Hawaii, as the case may be.

2.2 OVERSEAS TELEPOST Service is available to:

2.2.1 ITT tieline subscribers in the continental United States, Hawaii, Puerto Rico and the U.S. Virgin Islands as defined in Joint Tariff F.C.C. No. 7.

2.2.2 Telex subscribers of the PRCA in Puerto Rico.

4. Conditioning of Operations

4.1 Customers may avail themselves of OVERSEAS TELEPOST Service by:

4.1.1 Placing a call to the Company's operating center using his teleprinter.

4.1.2 Transmitting the routing number.

4.1.3 Addressing the OVERSEAS TELEPOST message to show the proper Post Office Department zip code number in the postal address.

4.2 On a single connection from a customer's station, to the Company's operating center, a customer may transmit a single OVERSEAS TELEPOST message, a series of two or more OVERSEAS TELEPOST messages or a multiple-address/common text OVERSEAS TELEPOST message (a "book").

4.3 The customer, in transmitting the OVERSEAS TELEPOST message, must use a format prescribed by and acceptable to the Company.

4.4 Plain language, abbreviations, code, cipher, and word or character spacing may be used within the address, message text or signature of OVERSEAS TELEPOST messages in any combination permitted by the nature of the customer's station equipment, except that the character sequences ZCZC, (CR) (LF) (BT) (CR) (LF), NNNN and (FIGS D) may not be used.

5. Regulations

5.1 OVERSEAS TELEPOST Service is furnished subject to the condition that it will not be used for unlawful purposes.

5.2 Delivery

5.2.1 OVERSEAS TELEPOST messages will be delivered by the U.S. Postal Service through designated Serving Post Offices at the point of destination by the next scheduled mail but, generally, delivery to the addressee will not be undertaken within less than 12 hours after filing time.

5.2.2 If an OVERSEAS TELEPOST message cannot be delivered by the U.S. Postal Service, for whatever reason, the customer will be notified of the non-delivery and the reason therefor. No charge shall be made for the advice of non-delivery. Should the reason for non-delivery be beyond the responsibility of the Company as defined herein, the sender must pay the usage and service charges, both for the original OVERSEAS TELEPOST message transmission and for any revised or new OVERSEAS TELEPOST message that he transmits.

5.2.3 If the OVERSEAS TELEPOST message is received at the Serving Post Office with an improperly spaced address or a type of addressing which will preclude delivery by the U.S. Postal Service, the sender will be notified and requested to send a new OVERSEAS TELEPOST message. Although the sender is responsible for the usage charges for each OVERSEAS TELEPOST message being transmitted, the service charge will apply only once. The charges mentioned above will be as set forth in 6.1.2 following.

5.3 Service Limitation

5.3.1 The Company reserves the right to limit the length of communicatio or to discontinue service temporarily when necessary because of conditions beyond its control or the requirements of its regularly established message telegram or telex services.

5.3.2 Upon non-payment of any sum owing to the Company for OVERSEAS TELEPOST Service or upon a violation of any of the conditions governing the furnishing of service under this tariff, or upon use of the Company's facilities for the purpose of performing any service in competition with the services which the Company or U.S. Postal Service may now or hereafter furnish, the Company may, without incurring any liability, forthwith discontinue the furnishing of facilities and services.

5.4 Liability: Since errors and interruptions incident to the service and to the use of the facilities are unavoidable, OVERSEAS TELEPOST Service furnished by the Company is subject to the terms, conditions and limitations herein stated:

5.4.1 With respect to the transmission of the OVERSEAS TELEPOST message from the customer's station to a teleprinter in a Serving Post Office, the following conditions apply:

(A) The liability of the Company for damages arising out of mistakes, omissions, interruptions, delays or errors or defects in transmission occuring in the course of furnishing service or facilities under this tariff and not caused by the negligence of the customer, or of the Company in failing to maintain proper standards of maintenance and operation and to exercise reasonable supervision, shall in no event exceed an amount equivalent to the charge to the customer for the time period during which such mistake, omission, interruption, delay or error or defect in transmission occurs.

(B) The liability of the Company for damages arising out of mistakes omissions, interruptions, delays or errors or defects occurring in the course of furnishing service or facilities under this tariff, whether caused by the negligence of its servants or otherwise, shall in no event exceed five hundred dollars for, or in connection with, any message.

(C) The Company shall be indemnified and saved harmless by the customer initiating the OVERSEAS TELEPOST message against all claims for libel, slander or the infringement of copyright arising from the material transmitted over the Company's facilities; and against all other claims arising out of any act or omission of the customer or the addressee in connection with the use of the OVERSEAS TELEPOST Service.

h respect to the local handling at a Serving Post Office and delivery by the U.S. Postal Service in the destination city, the following conditions apply:

(A) Company shall not be liable for mistakes or delays, whether caused by negligence or otherwise, subsequent to the time a OVERSEAS TELEPOST message is received on the Company's teleprinter at the Serving Post Office.

(B) No liability shall attach to the Company for any act, omissi or delay by the U.S. Postal Service in the delivery, nor non delivery, of the OVERSEAS TELEPOST message.

(C) The Company shall not be liable in any case for delays aris from interruption in the working of its facilities at the Serving Post Office, unless due to the negligence of the Co and in that event Company's liability shall be as provided 5.4.1 hereof.

5. Regulations (Cont'd)

5.4 Liability: (Cont'd)

5.4.3 The Company shall not be liable for damages or statutory penalties when the claim is not presented in writing to the Company within ninety days after the OVERSEAS TELEPOST message is accepted at the Company's operating center, provided, however, that this condition shall not apply to claims for damages or overcharges within the purview of Section 415 of the Communications Act of 1934, as amended.

6. Rates

6.1 The total charge for an OVERSEAS TELEPOST message is made up of two basic elements, a usage charge and a service charge. The usage charge (chargeable time) begins when the customer is connected to the Company's operating center, and ends when the customer terminates the call. A one-minute minimum usage charge applies for each and every OVERSEAS TELEPOST message.

6.1.1 A customer may transmit several OVERSEAS TELEPOST messages during a single call to the Company's operating center. The applicable usage and service charges for each OVERSEAS TELEPOST message transmitted will be the same as if the customer had made an individual call to transmit each such message.

6.1.2 A customer may transmit his OVERSEAS TELEPOST messages in a Multiple-Address/Common-Text format to the Company's operating center. The applicable usage and service charges for each OVERSEAS TELEPOST message transmitted will be the same as if the customer had made an individual call to transmit each such message.

6.1.3 Usage Charge

From:	To:	Charge per minute or fraction thereof
Continental United States	Hawaii	$2.00
	Puerto Rico	2.00
	U.S. Virgin Islands	2.00
Hawaii	Continental United States*	2.00
	Puerto Rico	3.00
	U.S. Virgin Islands	3.00
Puerto Rico or the U.S. Virgin Islands	Continental United States*	2.00
	Hawaii	3.00

6.1.4 A service charge of $.35 applies for each OVERSEAS TELEPOST message transmitted to a Serving Post Office for delivery by the U.S. Postal Service.

*Addresses located in specified zip code areas in accordance with Section 7. following.

Issued Effective

Issued by:
Earl S. Barbely, Manager, Rates and Tariffs,

6. RATES (Cont'd)

6.2 The rates published herein for OVERSEAS TELEPOST Service from Puerto Rico also apply on OVERSEAS TELEPOST messages which are filed by telex subscribers of the PRCA in Puerto Rico.

7. List of Zip Code References and Associated Serving Post Offices

Point to which OVERSEAS TELEPOST Messages is Destined	Where First 3 Digits of Post Office Zip Code Number are *	Serving Post Office is
California	939-941 943-944 949-951 954-955	San Francisco
District of Columbia	200-205 207-209 215 226-227	Washington, D.C.
Hawaii	967-968	Honolulu
New York	10001-10040 10045-10046 10048-10049 103-119,127	New York, N.Y.
Puerto Rico and U.S. Virgin Islands	006-009	San Juan

*Where the first three digits of a Post Office Zip Code number are 100, the entire 5 digit Zip Code number is shown.

Issued

Effective

Issued by:
Earl S. Barbely, Manager, Rates and Tariffs,
67 Broad Street, New York, N.Y. 10004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WESTERN UNION INTERNATIONAL, INC. Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA Respondents.	)	Docket No. 75-4132
WESTERN UNION INTERNATIONAL, INC. Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA Respondents.	)	Docket No. 75-4118

MOTION FOR LEAVE TO INTERVENE IN DOCKET NO. 75-4132 AND TO VACATE ORDER GRANTING LEAVE TO INTERVENE IN DOCKET NO. 75-4118

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure, The Western Union Telegraph Company ("Western Union") respectfully moves this Court (1) to grant it leave to intervene in Docket No. 75-4132 and (2) to vacate an order granting it leave to intervene in Docket No. 75-4118. In support thereof Western Union states as follows:

1. On or about July 16, 1975, an attorney representing Western Union telephoned the clerk's office to

obtain the docket number of a case initiated by a petition to review an order of the Federal Communications Commission filed by Western Union International ("WUI") on July 2, 1975. The attorney recited the caption of the case--Western Union International v. F.C.C.--and the date--July 2, 1975--the petition for review was filed. Unfortunately, he was given the docket number of another case which bears the same caption --Western Union International v. F.C.C.--but where the petition for review was filed by WUI several days earlier. As a result of this misunderstanding, Western Union filed, on July 17, a motion for leave to intervene captioned as Docket No. 75-4118 whereas it had actually sought to intervene, as the facts recited in its motion made clear, in Docket No. 75-4132. (See affidavit of Mr. Leon M. Kestenbaum attached hereto).

2. Subsequently, Western Union was granted leave to intervene in the wrong case--Docket No. 75-4118--where it has no real interest.

3. Western Union's interest and its reason for seeking intervention in Docket No. 75-4132, were explained in its motion of July 17. Briefly, in Docket No. 75-4132, WUI filed a petition to review and set aside a Memorandum Opinion and Order of the Federal Communications Commission released on June 23, 1975 and numbered 75-673. In its Order the Commission found that "neither the terms nor the legislative history of Section 222 require the conclusion that Western

Union is statutorily barred from seeking authority to provide mailgram service to Hawaii" and that Western Union's application to provide such service is therefore "acceptable for filing and comparative consideration".

4. Western Union participated fully in the proceedings leading to the issuance of the Commission's Memorandum Opinion and Order and it is, of course, directly affected by, and vitally concerned with, the Commission's decision to accept its application to provide Hawaii mailgram service.

5. Accordingly, Western Union has a substantial interest in Docket No. 75-4132 entitling it to intervene.

6. The time to file for leave to intervene in Docket No. 75-4132 expired on August 1, 1975. Western Union, however, did not discover that it had been granted intervention in the wrong case until today, August 4, 1975. Nevertheless, in view of the misunderstanding described above, it is clear that "good cause" exists under Rule 26(b) of the F.R.A.P. for a short extension of time, and Western Union hereby requests such an extension, should this be considered necessary for it to file the instant motion.

WHEREFORE, Western Union respectfully requests that its motion for leave to intervene in Docket No. 75-4132 be granted and that the Court vacate the order granting Western Union leave to intervene in Docket No. 75-4118.

Respectfully submitted,

THE WESTERN UNION TELEGRAPH COMPANY

Richard C. Hostetler (LMK)

Richard C. Hostetler
Vice President and General Counsel

One Lake Street
Upper Saddle River, New Jersey 07458

Jack Werner

Jack Werner
Robert N. Green
Leon M. Kestenbaum

1828 L Street, Northwest
Suite 1001
Washington, D. C. 20036

Attorneys for The Western Union Telegraph Company

Dated: August 4, 1975

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document filed with the United States Court of Appeals for the Second Circuit on behalf of The Western Union Telegraph Company by first class United States mail, postage prepaid, on the following:

John E. Ingle, Esquire
Office of the General Counsel
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Carl D. Lawson, Esquire
Antitrust Division
Department of Justice
Washington, D. C. 20530

Robert Michelson, Esquire
Western Union International, Inc.
One WUI Plaza
New York, New York 10004

Francis J. DeRosa, Esquire
RCA Global Communications, Inc.
Sixty Broad Street
New York, New York 10004

Leonard H. Marks, Esquire
Richard A. Helmick, Esquire
1920 L Street, N. W.
Washington, D. C. 20036

Leon M. Kestenbaum

August 4, 1975

A310

AFFIDAVIT

DISTRICT OF COLUMBIA)
) SS
WASHINGTON, D. C.)

LEON M. KESTENBAUM, being first duly sworn, on oath, deposes and says:

1. That he is employed by The Western Union Telegraph Company as a Senior Regulatory Counsel.

2. That on or about July 16, 1975 he telephoned the Clerk's office of the United States Court of Appeals for the Second Circuit to obtain the docket number of a case initiated by a petition to review an order of the Federal Communications Commission filed by Western Union International on July 2, 1975.

3. He recited the caption of the case--Western Union International v. F.C.C.--and the date--July 2, 1975--that the petition for review was filed. However, he was given the docket number of another case which bears the same caption--Western Union International v. F.C.C.--but which arose out of a different petition for review filed by WUI several days earlier.

4. As a result of this misunderstanding, Western Union filed, on July 17, a motion for leave to intervene captioned as Docket No. 75-4118, whereas it actually sought to intervene in Docket No. 75-4132.

LEON M. KESTENBAUM

Subscribed and sworn to before
me this 4th day of August, 1975.

Notary Public

My commission expires

My Commission Expires August 14, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WESTERN UNION INTERNATIONAL, INC.
Petitioner,

v. Docket No. 75-4132

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA
Respondents

WESTERN UNION INTERNATIONAL, INC.
Petitioner,

v. Docket No. 75-4118

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA
Respondents.

CORRECTIVE AMENDMENT TO MOTION FOR LEAVE TO INTERVENE

Pursuant to Rule 15(b) of the Federal Rules of Appellate Procedures and Local Rule 27(e), the State of Hawaii, through its attorneys, hereby amends its Motion for Leave to Intervene in Docket No. 75-4118 so as to specify Docket No. 75-4132 instead, and, in support thereof sets forth the following:

1. On or about July 17, 1975, the undersigned counsel spoke with an attorney representing The Western Union Telegraph Company ("WU") and requested a copy of a petition for review of an order of the Federal Communications Commission which had been filed by Western Union

International, Inc. with this Court on July 2, 1975 and served upon WU. Furthermore, the undersigned counsel, upon inquiring as to whether WU had contacted the Clerk's Office to obtain a docket number for the case, was informed that such inquiry had been made, and that the appropriate Docket Number was 75-4118.

2. Unfortunately, however, WU's counsel had been given the docket number for a case having the same caption - Western Union International, Inc. v. FCC -- which had, in fact, been filed several days prior to July 2, 1975 and in which the State of Hawaii had no interest. The details of this misunderstanding are set forth in WU's pleading of August 4, 1975, which was filed with this Court and which is appended hereto as Appendix A.

3. On July 30, 1975, in reliance on information given to WU's counsel and, in turn, conveyed to the undersigned counsel, the State of Hawaii requested leave to intervene in Docket No. 75-4118, not knowing that Docket Number 75-4312 was, in fact, the appropriate proceeding which it desired to participate in. A copy of the State of Hawaii's July 30 motion is set forth as Appendix B; in this regard a reading of Appendix B clearly shows that it was the intent of the State of Hawaii to participate in Docket No. 75-4132, rather than Docket No. 75-4118, and that the State of Hawaii has a substantial interest in the issues raised in Docket No. 75-4132.

4. Accordingly, the State of Hawaii hereby files the instant corrective amendment to its July 30 Motion for Leave to Intervene and requests that such motion and the corrective amendment be associated with

Docket No. 75-4132.

5. In the event that the Court deems to treat this Corrective Amendment as an initial motion for leave to intervene in Docket No. 75-4132, or in the event that the Court has already granted the State of Hawaii's earlier request to intervene in Docket No. 75-4118, the State of Hawaii respectfully requests leave to withdraw its motion to intervene in Docket No. 75-4118, since it has no interest in that proceeding, and further requests that the instant Corrective Amendment be treated as a motion for leave to intervene. Furthermore, in this regard, since the time for filing motions to intervene in Docket No. 75-4132 expired on August 1, 1975, a short extension of time would be required so that the instant Corrective Amendment may be given consideration. It is respectfully submitted that good cause would exist under Rule 26(b) of the F. R. A. P. for granting a short extension of time for filing such a request for intervention.

Respectfully submitted

Richard A. Helmick
Its Counsel

Cohn and Marks
1920 L Street, N. W.
Washington, D. C. 20036
(202) 293-3860

August 8, 1975

Appendix A to the State of Hawaii's Corrective Amendment to Motion for Leave to Intervene is WuTelCo's August 4, 1975 Motion for Leave to Intervene in Docket No. 75-4132, reproduced herein at pages A305-10.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WESTERN UNION INTERNATIONAL, INC., Petitioner	)	
vs	)	Case No. 75-4118
FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, Respondents.	)	

MOTION FOR LEAVE TO INTERVENE

The State of Hawaii, pursuant to § 2348 of the Judicial Code, 28 U.S.C. § 2348 (1970), Rule 15(d) of the Federal Rules of Appelate Procedure and Local Rule 27(e), hereby moves to intervene in the above-captioned case and, in support thereof, sets forth the following:

1. This case stems from a Petition for Review filed by Western Union International, Inc., ("WUI") on July 2, 1975. WUI's Petition is directed against the Federal Communications Commission's ("Commission") Memorandum Opinion and Order (FCC 75-673), released June 23, 1975, which held, in part, that Section 222 of the Communications Act, 47 U.S.C. § 222, does not preclude Western Union Telegraph Company ("WU") from providing Mailgram service between the United States Mainland and the State of Hawaii; the Commission, accordingly, directed the Chief of the Common Carrier Bureau to accept for filing an application which was first tendered by WU in April 1972 and which sought authorization to provide Mailgram service between the United States Mainland and Hawaii.

2. Subsequent to the Commission's June 23 directive that the Common Carrier Bureau accept WU's application to provide Mailgram service to Hawaii, WU filed an amendment to that application in which it proposed to integrate Mainland-Hawaii rates into the domestic rate pattern for Mailgram service presently being provided by WU within the lower 48 states and to and from Alaska through interconnection with RCA Alaska Communications, Inc. Thus, not only would the proposed Mailgram service provide citizens of Hawaii with an alternative to existing telegraph service being provided by WUI and other international record carriers between the Mainland and Hawaii, but also the integration of Hawaii into the domestic rate pattern for Mailgram service would result in substantial savings to users of such service and would sharply contrast the discriminatory pricing methods used by other carriers for communication services between the Mainland and Hawaii; in this regard, carriers presently treat service between the Mainland and Hawaii as "international" service rather than domestic service and do not integrate Mainland-Hawaii rates into domestic rate structures.

3. The State of Hawaii has a direct and substantial interest in this matter, both as a potential customer for WU's proposed Mailgram service, as well as parens patriae for the citizens of Hawaii. Should this Court reverse the Commission's decision that Section 222 of the Communications Act does not preclude WU from serving Hawaii, the State of Hawaii and its citizens may be adversely affected and subject to prejudice.

4. WHEREFORE, in view of its direct and substantial interest, the State of Hawaii respectfully moves for leave to intervene and participate as a party in interest in this proceeding.

Respectfully submitted,

THE STATE OF HAWAII

BY: Leonard H. Marks, RAH
Leonard H. Marks

BY: Richard A. Helmick
Richard A. Helmick

COHN AND MARKS
1920 L Street, N.W.
Washington, D.C. 20036

DATE: July 30, 1975

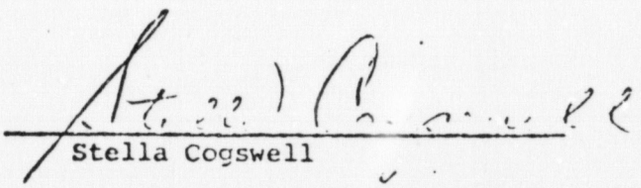
CERTIFICATE OF SERVICE

I, Stella Cogswell, hereby certify that I have this 30th day of July, served by First Class Mail, postage prepaid, a copy of the foregoing Motion for Leave to Intervene on the following parties to this proceeding:

Alvin K. Hellerstein, Esq.
Stroock, Stroock and Lavan
61 Broadway
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Attorneys for Petitioner WUI, Inc.

Ashton Hardy, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Jack Werner, Esq.
Laurence Singer, Esq.
Western Union Telegraph Co.
1828 L Street, N.W.
Washington, D.C. 20036



Stella Cogswell

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document filed with the United States Court of Appeals for the Second Circuit on behalf of the State of Hawaii by first class United States mail, postage prepaid, to the following:

John E. Ingle, Esquire
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Robert Michelson, Esquire
Western Union International, Inc.
One WPI Plaza
New York, New York 10004

Francis J. DeRosa, Esquire
RCA Global Communications, Inc.
Sixty Broad Street
New York, New York 10004

Richard C. Hostetler, Esquire
Western Union International, Inc.
One Lake Street
Upper Saddle River, NJ 07458

Jack Werner, Esquire
Robert N. Green, Esquire
Leon M. Kestenbaum, Esquire
Western Union International, Inc.
1828 L Street, N.W.
Suite 1001
Washington, D.C. 20036

Richard A. Helmick

August 8, 1975

CERTIFICATE OF SERVICE

I, Alan Kolod, hereby certify that I have this 12th day of December 1975, sent by first class United States mail, postage prepaid, a copy of the foregoing "Appendix" to the following:

Joel Yohalem, Esq.
c/o Western Union Telegraph Co.
1828 L Street, N.W.
Washington, D.C. 20036

Herbert E. Marks, Esq.
Wilkinson, Cragun & Barker
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Ashton Hardy, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W.
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Thomas E. Kauper, Esq.
Assistant Attorney General,
Department of Justice,
Anti Trust Division
Washington, D.C. 20530

Alan Kolod

Alan Kolod

Received 12/12/15 - 4:10 pm
Joe Stallings, MR98K

COPY RECEIVED
LeBOEUF, LAMB, [illegible] & MacRAE
BY
[signature]
AT 4:30 pm ON 12/12, 15